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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 38

NEIRBO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, ET AL., PETITIONERS,

vs.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 27, 1939.

CERTIORARI GRANTED MAY 29, 1939.

SUPREME COURT OF THE UNITED STATES

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United States Circuit Court of Appeals.

FOR THE SECOND CIRCUIT

NEIBRO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, DENIS F. O'BRIEN AND EMMA BOURKE,
Appellants,

against

BETHLEHEM SHIPBUILDING CORPORATION, LTD.,
Appellee,

and

UNITED SHIPYARDS, INC., JOSEPH W. POWELL, HUBERT E. ROGERS, JOHN E. ALDRED and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,
Defendants.

Statement Pursuant to Rule 13.

I.

This suit was commenced on May 27, 1938 by the filing of the original bill, the issuance of a subpoena directed to the defendant UNITED SHIPYARDS, INC., then the sole defendant, and by the granting of an order requiring UNITED to show cause why a temporary injunction should not be granted staying it, pending final decree, from carrying out a contract for the sale of its shipyards to BETHLEHEM, and adding as additional defendants POWELL, ROGERS, ALDRED AND the CHASE BANK. The relief prayed for in the bill was a permanent injunction restraining UNITED from carrying out the

contract. By order dated June 6, 1938 a stay was denied, but POWELL, ROGERS, ALDRED and the CHASE BANK were added as additional defendants.

II.

By order dated July 26, 1938 BETHLEHEM was added as an additional defendant, and pursuant to leave contained in the order an amended and supplemental bill was filed alleging the consumation of the sale and praying relief in respect thereof, and a supplemental subpoena was issued requiring BETHLEHEM to appear and answer the amended and supplemental bill.

III.

On August 13, 1938 BETHLEHEM appeared specially by Messrs. Cravath, deGersdorff, Swaine & Wood and obtained an order directing complainants to show cause why service of the subpoena and the Marshal's return of service of the subpoena on BETHLEHEM should not be set aside on the ground that the venue of the suit, as against BETHLEHEM, was improperly laid in the Southern District of New York, the jurisdiction of the Court being based on diversity of citizenship, and BETHLEHEM claiming that it appeared from the face of the bill that complainants are citizens and residents of the State of New Jersey and inhabitants of the District of New Jersey, and BETHLEHEM is a citizen and resident of the State of Delaware, and an inhabitant of the District of Delaware.

The motion was argued before Judge Caffey on September 2, 1938, and the order appealed from, granting the motion, was made by him on September 26, 1938. This appeal was taken on December 17, 1938.

Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

NEIRBO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, DENIS F. O'BRIEN and EMMA BOURKE,

Complainants,

against

UNITED SHIPYARDS, INC., JOSEPH W. POWELL, HUBERT E. ROGERS, JOHN E. ALDRED, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK and BETHLEHEM SHIPBUILDING CORPORATION, LTD.,

Defendants.

Notice is hereby given that NEIRBO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, DENIS F. O'BRIEN and EMMA BOURKE, the complainants above named, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the order dated and filed September 26, 1938 setting aside, vacating and quashing the attempted service of the supplementary subpoena herein, dated July 27, 1938 upon BETHLEHEM SHIPBUILDING CORPORATION, LTD. and dismissing the amended and supplemental bill of complaint as against BETHLEHEM SHIPBUILDING CORPORATION, LTD.

Dated, New York, December 17, 1938.

ROBERT P. WEIL,
Solicitor for Complainants,
50 Broadway,
New York, N. Y.

To:

CRAVATH, deGERSDORFF, SWAINE & WOOD,
Solicitors for defendant
BETHLEHEM SHIPBUILDING CORPORATION, LTD.,
appearing specially.

CHARLES WEISER, Clerk,
UNITED STATES DISTRICT COURT,
Southern District of New York.

Order Appealed From.

(Same Title)

This cause having come on further to be heard upon the motion of Bethlehem Shipbuilding Corporation, Ltd., appearing specially solely for the purpose of said motion, for an order setting aside, vacating and quashing the marshal's return of service and the attempted service upon it of the supplemental equity subpoena dated July 27, 1938, and said motion having been argued by counsel, and upon due consideration thereof, it is

ORDERED that the said motion be and is hereby in all respects granted, and the attempted service of the supplemental equity subpoena herein, dated July 27, 1938, and the marshal's return of said service dated July 28, 1938, upon Bethlehem Shipbuilding Corporation, Ltd., be and are hereby set aside, vacated and quashed, and the amended and supplemental bill of complaint herein, verified July 15, 1938, is accordingly dismissed as to said Bethlehem Shipbuilding Corporation, Ltd.

Dated New York, September 26th, 1938.

FRANCIS G. CAFFEY,
U. S. D. J.

Opinion of Judge Caffey on Making the Order Appealed From.

The sole problem is the interpretation of Section 51 of the Judicial Code (28 U. S. C. A. Sec. 112). It is settled by Camp v. Gress, 250 U. S. 308 that the section confers on Bethlehem the right to object to the venue which the complainants assert in this suit. In a decision with which I agree this court has squarely held that this right has not been waived by Bethlehem doing business in New York, obtaining a certificate to do business and designating an agent for service of process on it, in conformity with a state statute (*Beachnut Packing Co.* v. *P. Lorillard Co.*, 287 Fed. 271).

Motion granted and bill as against Bethlehem dismissed. Settle order or two days' notice.

September 15, 1938.

F. G. C.

Order Permitting Filing of Amended and Supplemental Bill, Adding Bethlehem as a Party Defendant, and Authorizing the Issuance of a Supplemental Subpoena Requiring Bethlehem to Answer Amended and Supplemental Bill.

(Same Title)

The complainants having moved this Court for an order:

1. approving the filing of their amended and supplemental bill of complaint as a supplemental bill of complaint and directing that the defendants United Shipyards, Inc., Joseph W. Powell, Hubert E. Rogers, John E. Aldred and The Chase National Bank of the City of New York be required to answer said supplemental bill of complaint;

2. adding BETHLEHEM SHIPBUILDING CORPORATION, LTD. as a party defendant and directing the issuance of a supplemental subpoena to said Bethlehem Shipbuilding Corporation, Ltd. requiring Bethlehem Shipbuilding Corporation, Ltd. to appear and answer said supplemental bill of complaint; and

3. amending the caption of this suit;

and said motion having regularly come on to be heard before the Court at a Stated Term thereof, held in and for the Southern District of New York, at the United States Courthouse on July 26, 1938 and after hearing ROBERT P. WEIL, solicitor for the complainants in support of said motion, and the defendant United Shipyards, Inc., Joseph W. Powell, Hubert E. Rogers, and John E. Aldred having appeared by Rogers and Whitaker, their solicitors, by David Katz, Esq., of counsel, and the defendant The Chase National Bank of the City of New York having appeared by Mudge, Stern, Williams & Tucker, their solicitors, by Milton Black, Esq.,

Order Permitting Filing of Amended and Supplemental Bill, etc.

of counsel, and none of said defendants having interposed any opposition to the granting of said motion,

Now, on motion of Robert P. Weil, solicitor for the complainants, it is upon said amended and supplemental bill of complaint, and upon the order of Honorable Henry W. Goddard, dated July 18, 1938, requiring the defendants to appear on July 19, 1938 and show cause why complainants should not have the aforesaid relief, and upon the affidavit of Robert P. Weil, sworn to July 18, 1938 in support of said motion, and upon due proof of the service of said order to show cause upon the defendants and of the complainants' notice that said motion would be brought on for hearing July 26, 1938 and upon all the other pleadings and proceedings herein,

ORDERED that the filing of the amended and supplemental bill of complaint herein be and the same hereby is approved as the filing of a supplemental bill of complaint, the defendants UNITED SHIPYARDS, INC., JOSEPH W. POWELL, HUBERT E. ROGERS, JOHN E. ALDRED and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK are required to answer said amended and supplemental bill of complaint or move with respect thereto within 20 days after service of a copy of this order with notice of filing; and it is

FURTHER ORDERED that Bethlehem Shipbuilding Corporation, Ltd. is hereby joined herein as an additional party defendant and a supplemental subpoena shall issue requiring said Bethlehem Shipbuilding Corporation, Ltd. to appear and answer or move with respect to said amended and supplemental bill of complaint within 20 days after service of said subpoena and of a copy of this order with notice of filing; and it is

22 *Order Permitting Filing of Amended and Supplemental Bill, etc.*

FURTHER ORDERED that the caption of this action be as follows:

"United States District Court
Southern District of New York

Neirbo Company, The A. P. Smith Manufacturing Company, Denis F. O'Brien and Emma Bourke,

Complainants,

23 against

United Shipyards, Inc., Joseph W. Powell, Hubert E. Rogers, John E. Aldred, The Chase National Bank of the City of New York and Bethlehem Shipbuilding Corporation, Ltd.,

Defendants.

In Equity No. E-87/117"

Dated, New York, July 26th, 1938.

HENRY W. GODDARD,
United States District Judge.

24 The foregoing order is hereby consented to as to form.

ROGERS & WHITAKER

ROGERS & WHITAKER, Solicitors for Defendants United Shipyards, Inc., Joseph W. Powell, Hubert E. Rogers and John E. Aldred.

MUDGE, STERN, WILLIAMS & TUCKER

MUDGE, STERN, WILLIAMS & TUCKER, Solicitors for Defendant The Chase National Bank of the City of New York.

Amended and Supplemental Bill.

(Same Title)

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

COME NOW the complainants above named, by ROBERT P. WEIL, their solicitor, and allege for their amended and supplemental bill of complaint:

1. Complainant NEIRBO COMPANY (sometimes hereinafter referred to as NEIRBO) is, and at all times herein mentioned has been, a corporation organized and existing under the laws of the State of New Jersey and is a citizen and resident of the State of New Jersey.

2. Complainant THE A. P. SMITH MANUFACTURING COMPANY is, and at all times herein mentioned has been, a corporation organized and existing under the laws of the State of New Jersey and is a citizen and resident of the State of New Jersey.

3. Complainant DENIS F. O'BRIEN (sometimes hereinafter referred to as O'BRIEN) is, and at all times herein mentioned has been, a citizen and resident of the State of New Jersey.

4. Complainant EMMA BOURKE is, and at all times herein mentioned has been, a citizen and resident of the State of New Jersey.

5. Defendant UNITED SHIPYARDS, INC. (sometimes hereinafter referred to as UNITED) was organized under the Stock Corporation Law of the State of New York pursuant to certificate filed with the Department of State of the State of New York on December 13, 1928, with the name "UNITED DRY DOCKS, INCORPORATED". By certificate filed with the

Department of State of the State of New York on May 5, 1936, the name of UNITED was changed to "UNITED SHIPYARDS, INC.", its present designation. UNITED is, and at all times since its aforesaid incorporation has been, a citizen and resident of the State of New York. The executive office and principal place of business of UNITED is at #11 Broadway, New York City, in the Southern District of New York.

6. Defendant THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK (sometimes hereinafter referred to as the CHASE BANK) is a national banking association chartered to do business in the State of New York and is a citizen and resident of the State of New York. The principal office of the Chase Bank is at #10 Pine Street, New York City, in the Southern District of New York.

7. Defendant BETHLEHEM SHIPBUILDING CORPORATION, LTD. (sometimes hereinafter referred to as BETHLEHEM) is, and at all times herein mentioned has been, a corporation organized and existing under the laws of the State of Delaware and is a citizen and resident of the State of Delaware. Bethlehem has a permanent office, at which it regularly transacts its business, at #25 Broadway, New York City, in the Southern District of New York and is permanently present in the Southern District of New York for the conduct of its business.

8. Defendant JOSEPH W. POWELL (sometimes hereinafter referred to as POWELL) is a citizen of the State of Massachusetts, but is engaged in business as President of UNITED, and as such is permanently present in the Southern District of New York.

9. Defendant HUBERT E. ROGERS (sometimes hereinafter referred to as ROGERS) is a citizen and resident of the State of New York and of the Southern District of New York.

10. Defendant JOHN E. ALDRED (sometimes hereinafter referred to as ALDRED) is a citizen and resident of the State of New York. Aldred is engaged in business at #40 Wall Street in the City of New York and is permanently present in the Southern District of New York. 31

11. Powell, Rogers, Aldred and the Chase Bank own, hold, or control upwards of two-thirds of the total outstanding Class A shares of United, and have owned, held or controlled said Class A shares since the original issuance thereof in May, 1936, as hereinafter more particularly set forth.

12. The complainants are respectively the owners and holders of the shares of the Class B stock of UNITED represented by the following certificates: 32

Certificate No.	Issued in Name of	No. Shares
NEIRBO COMPANY		
BNC 857	Neirbo Company	100
BNC 858	Neirbo Company	100
BNC 859	Neirbo Company	100
BNC 860	Neirbo Company	100
BNC 861	Neirbo Company	100
BNC 862	Neirbo Company	100
BNC 863	Neirbo Company	100
BNL 438	Neirbo Company	87
B 42	Neirbo Company	½ 33
BNC 852	Denis F. O'Brien	100
BNC 853	Denis F. O'Brien	100
BNC 854	Denis F. O'Brien	100
BNC 855	Denis F. O'Brien	100
BNC 856	Denis F. O'Brien	100
BN 7	Neirbo Company	200
BN 8	Neirbo Company	500
		1987½

Certificate No.	Issued in Name of	No. Shares
THE A. P. SMITH MANUFACTURING COMPANY		
BNC 864	Peter A. Smith	100
BNC 865	Peter A. Smith	100
BNC 866	Peter A. Smith	100
BNC 867	Peter A. Smith	100
BNC 868	Peter A. Smith	100
BNC 869	Peter A. Smith	100
BNC 870	Peter A. Smith	100
BNC 871	Peter A. Smith	100
BNC 872	Peter A. Smith	100
		900
DENIS F. O'BRIEN		
BNL 437	Denis F. O'Brien	50
EMMA BOURKE (MISS)		
BNL 694	Miss Emma Bourke	35

13. The value of the above listed shares owned and held by complainant Neirbo exceeds $3,000 and the effect of the sale of the plants of UNITED to Bethlehem, hereinafter more particularly referred to, has, or will, result in a decrease in the value of said shares, which decrease, upon information and belief has exceeded or will exceed $3,000 exclusive of interest. The matter in controversy herein exceeds the sum or value of $3,000 exclusive of interest and costs.

14. JOSEPH W. POWELL, (sometimes hereinafter referred to as POWELL) is a graduate of the United States Naval Academy, is an engineer by profession, and is an expert in the design and construction of ships, and in the operation of shipyards, prior to his connection with UNITED having been successively president of Fore River Shipbuilding Company, a subsidiary of Bethlehem Steel Corporation, vice president of Bethlehem, and chairman of the United States Shipping Board Emergency Fleet Corporation. As hereinafter more specifically set forth, Powell was one of the organizers

of UNITED, was chairman of the Board for about a year after it commenced business, and thereafter became president, which office he has held at all times up to the present. At all times Powell has been a director of UNITED.

15. Rogers is a lawyer. He was active with Powell in the organization of UNITED, and at all times has been secretary and a director of UNITED. Rogers & Whitaker, Rogers' firm, has at all times been general counsel to UNITED.

16. Upon information and belief, in or about the Fall of 1928, the Chase Bank held a mortgage on the properties of W. & A. Fletcher Company in the sum of $2,000,000 which mortgage was in default. W. & A. Fletcher Company was in receivership in the Chancery Court of New Jersey, and in the receivership suit, an order had been made restraining the Chase Bank from foreclosing said mortgage. Aldred or Aldred & Company owned a one half interest in New York Harbor Dry Dock Company. The interest of the defendants other than UNITED in companies operating shipyards in New York Harbor is unknown to complainants. At that time, Powell, Rogers, Aldred, the Chase Bank and The Chase Securities Corporation, its then subsidiary, entered into a scheme to launch a public company to acquire and combine the business and properties of W. & A. Fletcher Company, New York Harbor Dry Dock Company, and other corporations operating shipyards in New York Harbor.

17. In pursuance of this scheme, UNITED was incorporated as aforesaid, with an authorized capital consisting of 200 shares without par value. On January 7, 1929 none of said shares were issued or outstanding. On January 7, 1929, pursuant to section 36 of the Stock Corporation Law of the State of New York, a certificate was filed in the office of the Secretary of State of the State of New York increasing the

number of shares which UNITED was authorized to issue to 870,000 shares, divided into 20,000 shares of 6% Preferred stock, of the par value of $100. each and 850,000 shares of Common stock without par value. Said Preferred stock was entitled to a dividend of 6% per annum, when and as declared by the Board of Directors, in preference to any dividend on the Common stock. Said dividend was non-cumulative until January 1, 1932, and cumulative thereafter. Upon dissolution, or upon any other distribution of assets, other than as a dividend from surplus or net profits, the Preferred stock was entitled to payment of $100. per share plus non-
41 cumulative dividends declared and unpaid, and plus cumulative dividends accrued and unpaid, in preference to any distribution to the holders of the Common Stock. Said Preferred stock was non-participating both as to dividends from net earnings or surplus and upon any other distribution of assets; that is to say, after payment of Preferred dividends, the holders of the Common stock were entitled to receive the entire amount set apart from time to time from net earnings or surplus for dividend purposes, and upon dissolution or upon any other distribution of assets other than as a dividend from net earnings or surplus, the holders of the Common stock were entitled to receive the entire net assets of the corporation then available for distribution to stockholders
42 after payment to the holders of the Preferred stock of $100. per share plus unpaid Preferred dividends as aforesaid. On all matters and without restriction the stockholders were entitled to one vote in respect of each share of stock. Up to December 31, 1933, each share of Preferred stock was, at the option of the holder thereof, exchangeable into 2½ shares of Common stock. The Preferred stock was callable after January 1, 1934 at $100. a share plus accrued unpaid dividends.

18. Pursuant to the scheme aforesaid, in or about the early part of 1929 UNITED entered into agreements to acquire

the business and properties of the following corporations operating shipyards in New York Harbor:

Staten Island Shipbuilding Company
Morse Dry Dock and Repair Company
James Shewan and Sons Company
Theodore A. Crane's Sons Company
W. & A. Fletcher Company
New York Harbor Dry Cork Company

19. The consideration which UNITED agreed to pay for the assets of each of said companies is unknown to complainants. 44
The aggregate however, was, upon information and belief

for plants, machinery and equipment....	$18,840,000
for materials and supplies	1,250,000
	$20,090,000

20. In or about the early part of 1929 some 553,750 shares of No Par Value Common Stock of United were underwritten and marketed for $11,075,000, and Preferred stock of United of the par value of $1,815,000 was issued for property.

21. Upon information and belief, the underwriters included The Chase Securities Corporation, Hayden, Stone & Company, Pynchon & Company and Minch, Monell & Company. 45

22. In the Fall of 1928 O'Brien was the owner of a substantial interest in BAKER SCOTT CORPORATION, a close corporation.

23. In or about the Fall of 1928, Powell stated to O'Brien and other persons interested in Baker Scott Corporation

(a) that Powell was endeavoring to arrange for the consolidation under one management, and the acquisi-

tion by a corporation to be formed for the purpose, of the properties and business of the corporations hereinabove named in Paragraph 18 hereof;

(b) That said properties had been appraised by Coverdale & Colpitts at approximately $26,000,000;

(c) that the new company was acquiring said properties at a reasonable figure, substantially less than $26,000,000;

(d) that the new company would have upwards of 50% of the drydock facilities of New York Harbor and a large portion of the New York Harbor facilities for repairing vessels;

(e) that the rates in New York Harbor for dry-docking and repairing vessels were substantially below the rates therefor in other ports on the Atlantic Seaboard;

(f) that he and his associates in the enterprise confidently believed that this discrepancy would be adjusted;

(g) that he believed that the new company would have a stable and profitable business and would be able to show at least a satisfactory return upon the capital invested therein, and that the new company was being launched for the sole purpose of legitimately prosecuting such business.

24. Relying upon said statements of Powell, O'Brien and others interested in said Baker Scott Corporation caused said corporation to subscribe for 30,000 shares of the Common stock of UNITED at $20.00 per share, or a total of $600,000.

25. Shortly after January 7, 1929 Baker Scott Corporation paid in cash for the shares for which it subscribed as aforesaid and received said shares from UNITED.

26. The complainants acquired their Class B stock in the manner following:

In 1931 Baker Scott Corporation divided the shares of UNITED purchased as aforesaid, among its shareholders pro rata. A portion of the shares so distributed to O'Brien were held by him and a portion thereof were assigned by him to his personal holding company, Neirbo. In addition, shortly after the above alleged purchase by Baker Scott Corporation and long before the commencement of the reorganization proceedings hereinafter referred to, O'Brien purchased additional Common shares of UNITED for the complainant The A. P. Smith Manufacturing Company, of which he is president, 50 and for his sister-in-law Miss Emma Bourke.

In or about May, 1936, pursuant to the Amended Plan of Reorganization of UNITED, hereinafter more particularly referred to, each two shares of Common stock were converted into one share of Class B stock, the certificates listed in Paragraph 12 hereof being thereupon and pursuant to said Plan issued to the complainants.

27. As of February 28, 1929, UNITED acquired the properties and business of the corporations referred to in Paragraph 18.

28. As of March 1, 1929, UNITED commenced business with the following balance sheet: 51

ASSETS:		
Plants, machinery and equipment at cost		$18,840,000
Current Assets:		
Cash	$2,200,000	
Materials and supplies	1,250,000	
		3,450,000
Organization expenses, etc.		250,000
		$22,540,000

LIABILITIES:

6% Preferred stock, $100 par value, Outstanding 18,150 shares		$ 1,815,000
Common stock, no par value, Outstanding 553,750 shares		11,075,000
Mortgages:		
Alderton Plant mortgage is assumed	$1,150,000	
Purchase money mortgages given by United on other plant	8,500,000	
		9,650,000
		$22,540,000

29. In part payment of the purchase price, UNITED as of February 28, 1929, gave back 10 year purchase money mortgages at 5% interest in the following respective amounts on the plants acquired:

Staten Island Shipbuilding Company	$2,500,000
Morse Dry Dock & Repair Company	2,900,000
W. & A. Fletcher Company	500,000
James Shewan & Sons Company	1,300,000
Theodore A. Crane's Sons Company	800,000
New York Harbor Dry Dock Company	500,000

30. As of February 28, 1929, James A. Shewan & Sons Company assigned the mortgage given by UNITED to it to Powell and Rogers, and Powell and Rogers further assigned said mortgage to the Chase Bank.

31. As of February 28, 1929, Theodore A. Crane's Sons Company assigned a senior $400,000 interest in the mortgage given by UNITED to it to Powell and Rogers, and Powell and Rogers further assigned said interest to the Chase Bank.

32. New York Harbor Dry Dock Company assigned a one half interest in the mortgage given by UNITED to it to Aldred & Company, the firm of Aldred, and the remaining one half interest in said mortgage to Swan, Hunter and Wigham, Richardson, Ltd. Thereafter Aldred & Company assigned said interest to the Chase Bank.

33. Subsequent to February 28, 1929, UNITED acquired title to the land upon which the plant acquired from the New York Harbor Dry Dock Company was located, and in part payment therefor gave a purchase money mortgage in the sum of $165,000.

34. Shortly after commencing operations, UNITED closed said plant and sold the real estate to O'Brien Brothers Shipyards Corporation. Said sale did not include tools, stores, and two drydocks, one of which drydocks was sold to Todd Shipyards Corporation.

35. As of February 28, 1929 John W. Enright and Andrew Fletcher, Jr. as Receivers of W. & A. Fletcher Company assigned the mortgage given by UNITED to them as Receivers to the Chase Bank.

36. UNITED took title to one of the plants of the Morse Dry Dock & Repair Company known as the Alderton Yard, located at #518 Hamilton Avenue, Borough of Brooklyn, New York City, subject to two mortgages in addition to the aforementioned purchase money mortgage for $2,900,000. The first mortgage, originally in the sum of $600,000. was held by the New York Title & Mortgage Company. Said first mortgage had been reduced by payments on account of principal so that on February 28, 1929 there was due thereon approximately the sum of $414,370. The second mortgage was in the sum of $300,000 and was held by Flor-

ence M. Rogers. The third mortgage, originally in the sum of $425,000 was held by Alderton Dockyards, Ltd. The said third mortgage had been reduced by payments on account of principal so that on February 28, 1929 there was due thereon approximately $415,000. UNITED paid the purchase price for the properties acquired by it from said Morse Dry Dock & Repair Company in part by assuming and agreeing to pay said three last mentioned mortgages.

37. On or about September 15, 1931, said second mortgage held by Florence M. Rogers was paid off by UNITED and satisfied of record and the lien thereof on said Alderton Yard extinguished, and thereby the said mortgage held by Alderton Dockyards, Ltd., became a second mortgage on the Alderton Yard, subject and subordinate only to the aforementioned first mortgage held by the New York Title and Mortgage Company.

38. MOSS ESTATE, INCORPORATED is, and at all times herein mentioned, since January 1, 1933 has been, a personal holding corporation controlled by Rogers.

39. In 1933 Moss Estate, Incorporated, acquired a $315,000 senior interest in said second mortgage on the Alderton Yard.

40. Upon information and belief the consideration for the acquisition of said mortgage by Moss Estate, Incorporated, was the sum of $80,000 paid by Rogers.

41. Shortly after commencing operations, UNITED closed and dismantled said plant.

42. In July, 1930, UNITED acquired the business and substantially all of the property, real and personal, of BRIGGS ENGINEERING COMPANY.

43. UNITED paid part of the consideration therefor by giving back a five year purchase money mortgage in the sum of $70,000 at 5% interest. 61

44. In 1933, UNITED closed said plant and sold a portion of the real estate.

45. On July 23, 1934, UNITED filed in this Court a petition praying that it be reorganized under section 77B of the Bankruptcy Act. On the same day this Court entered an order approving said petition and authorizing the defendant to continue the operation of its business. Rogers and Whitaker, the law firm of Rogers, were attorneys for UNITED as debtor in said proceedings. 62

46. On or about December 23, 1935, UNITED as debtor in said proceedings proposed its Amended Plan of Reorganization, sometimes hereinafter referred to as "the Plan".

47. Certain of the principal features of the Plan were as follows:

(a) The purchase money mortgages given by UNITED to Staten Island Shipbuilding Company and to Morse Dry Dock & Repair Company were extended and modified so as to make the interest rate dependent upon the earnings of the defendant except for minimum annual payments, and so as to relieve the defendant of any obligation for a deficiency judgment in case either of said mortgages should be foreclosed. 63

(b) The leases on the Shewan Plant and the Fletcher Plant were extended and modified so that the rental would be dependent on the earnings of the company, except for minimum annual payments.

(c) The premises upon which the Alderton Plant was located were abandoned, leave being given to the holder of the first mortgage thereon to foreclose said mortgage.

(d) The lease of the premises upon which the Crane Plant was located was cancelled by agreement.

(e) The unsold portion of the Briggs property was surrendered to the holder of the mortgage thereon.

(f) The authorized capital of UNITED was changed so as to consist of 1,000,000 shares of Class A and 345,000 shares of Class B stock. The Class A stock was distributed on the allowed claims of creditors and the Class B stock on the allowed claims of stockholders.

(g) Certain other claims, and the disposition thereof pursuant to the Plan were as follows:

1. The claims of the mortgagees and landlords for unpaid interest and rent were satisfied by the issuance of one Class A share for each $20 of claim allowed.

2. The Chase Bank filed a claim for $1,251,400 principal and $199,311.12 interest, secured by the mortgage on the Shewan Plant as pledgee of said mortgage as security for a personal loan owing by Powell and Rogers. The claim was allowed and the Plan provided for satisfaction thereof by the issuance to the Chase Bank of Class A stock at the rate of one share for each $10 of principal and one share for each $20 of interest or a total of 134,122 shares.

3. The Chase Bank filed a claim as the holder of the senior $400,000 interest in the mortgage on the

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Crane plant, as pledgee of said interest as security for a personal loan to Powell and Rogers, and the Crane Company filed a claim as the holder of the junior $400,000 interest therein. $800,000 principal and $126,277 interest was the indebtedness of UNITED on said mortgage. The Plan provided for satisfaction of said claims by the issuance of Class A stock at the rate of one share for each $10 of principal and one share for each $20 of interest, two-thirds of said shares to the Chase Bank, or 54,540 shares, and one-third to the Crane Company, or 28,770 shares.

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4. The Chase Bank filed a claim for $249,725 principal and $39,403.04 interest secured by a half interest in the mortgage on the New York Harbor Dry Dock Company plant as pledgee of said interest as security for a personal loan owing by Aldred & Company. Swan, Hunter and Wigham, Richardson, Ltd. filed a claim in like amount as the owner of the other half interest in said mortgage. Said claims were allowed and the Plan provided for satisfaction thereof by the issuance of Class A stock at the rate of one share for each $10 of principal and one share for each $20 of interest, or a total of 26,749 shares to the Chase Bank and 26,749 shares to Swan, Hunter and Wigham, Richardson, Ltd.

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5. The Chase Bank filed a claim for $499,200 principal and $78,766.64 interest, secured by a mortgage on the Fletcher plant, as the owner of said mortgage: The claim was allowed and the Plan provided for satisfaction thereof by the issuance of Class A stock to the Chase Bank at the rate of one share for each $10 of principal and one share for each $20 of interest, or a total of 53,472 shares.

6. Moss Estate, Incorporated filed a claim as the owner of a senior interest in the second mortgage on the Alderton Yard. Said claim was allowed for $415,000 principal and $10,841.17 interest, and the Plan provided for the satisfaction thereof by the issuance of Class A stock to Moss Estate, Incorporated at the rate of one share for each $20 of principal and interest, or 21,892 shares.

The allowance of said claim was subject to reduction by the amount of any sum received by Moss Estate, Incorporated out of the proceeds of the sale of the property in proceedings for the foreclosure of the first mortgage, provided, however, that the claim of Moss Estate, Incorporated might be fixed at the sum of $425,841.17 and Class A stock totalling 21,292 shares might be issued in respect thereof upon assignment by Moss Estate, Incorporated to UNITED of its right to receive a share of the proceeds of the aforesaid foreclosure sale. Upon information and belief, such an assignment was made by Moss Estate, Incorporated to UNITED.

Upon information and belief Rogers never disclosed to the Court or to the general body of the creditors and stockholders of UNITED that Moss Estate, Incorporated had acquired its interest in said mortgage on the Alderton Yard for $80,000 or for any amount less than the face value of said interest, and at all times during the pendency of said proceedings, said fact was unknown to the Court and to the general body of the creditors and stockholders of UNITED.

7. Claims for accounts payable were allowed in the sum of approximately $225,000. The Plan provided that there be issued in satisfaction thereof Class A stock at the rate of one share for each $20 of such claims allowed.

Out of a total of 411,710 shares of Class A stock issued and outstanding pursuant to the Plan, the Plan thus provided that 290,775 shares be issued to or for the account of the Chase Bank, Powell, Rogers, Rogers' company, Moss Estate, Incorporated, and Aldred's firm, Aldred & Company, of which 215,411 shares were to be issued to the Chase Bank in satisfaction of claims based on mortgages on the companys' property, pledged for personal loans to Powell, Rogers and Aldred & Company.

(h) The claims of stockholders were disposed of pursuant to the Plan as follows: 74

1. Each share of the Preferred stock was converted into four shares of Class B stock.

2. Each two shares of Common stock were converted into one share of Class B stock.

48. The Plan provided as follows with respect to the voting rights of the proposed new Class A and Class B stock:

(Sub-division III).

"Each share of Class A stock shall entitle the holder to one vote on all matters, including but not limited to, 75
the election of directors, except the election of the director to be elected by the holders of the Class B stock as hereinafter provided, * * *. The holders of Class B stock shall not be entitled to vote upon any matters except as required by law and except that, voting as a class, they shall be entitled to elect one member of the Board of Directors of the Reorganized Company, and in voting for such one member of the Board of Directors, each holder of such Class B stock shall be entitled to one

vote for each share thereof. * * * Subject to the foregoing provisions and to any orders of the Court in the premises, the forms and terms of the Certificate of Incorporation, by-laws and certificates for capital stock of the reorganized company shall be such as the Board of Directors and/or stockholders of the Company or Reorganized Company may determine."

49. Section 51 of the Stock Corporation Law of the State of New York provides, and at all times herein mentioned has provided, that any class of stock may be excluded from the right to vote on all or any specified questions upon which the stockholders of a New York corporation would otherwise be entitled to vote, but that, except as specifically and in so many words excluded therefrom, all stockholders shall be entitled to vote on a proposal to sell substantially all of the assets of the corporation, and upon certain other matters enumerated in said section 51.

50. At a hearing on notice to all interested parties, including the Preferred and Common stockholders of UNITED, held in this Court on March 27, 1936, the Plan was declared confirmed, and on April 1, 1936, a decree of confirmation was filed.

51. Nevertheless, Powell, Rogers, Aldred and the Chase Bank deprived the holder of the Class B stock of the Reorganized Company, into which stock the Preferred and Common shares were to be converted, of the right to vote on a proposal to sell the assets of the corporation in the manner following:

(a) They sent out to all stockholders, and solicited all stockholders to execute, a form of instrument, which, when executed, would be effective as

(i) a consent to the Plan;

(ii) a proxy to Powell, Rogers and one George H. Bates, or any of them, to vote the stock of the signer, upon confirmation of the Plan, in favor of amendments to the Certificate of Incorporation necessary or advisable to put the Plan into effect;

(iii) a waiver by the signer of notice of a meeting of stockholders to consider such amendments to the Certificate of Incorporation.

(b) They called a special meeting of stockholders for 80
April 11, 1936

"* * * to consider and vote upon the following proposals in connection with putting into effect and carrying out the provisions of the Plan of Reorganization as amended, dated December 23, 1935, which Plan of Reorganization was confirmed by a Decree of the United States District Court for the Southern District of New York, dated April 1, 1936: (1) to reduce the authorized number of shares of 6% Preferred Stock of the par value of $100 per share from 20,000 to 16,275; (2) to change the 16,275 shares of said 6% Preferred Stock, authorized and issued after such re- 81
duction, into 16,275 shares of 6% Preferred Stock without par value; (3) to change the 16,275 shares of said 6% Preferred Stock without par value, authorized and issued, after the changes proposed in (1) and (2) have been affected, into 65,100 shares of Class B stock of the par value of $1 per share; (4) to reduce the authorized number of shares of Common Stock without par value from 850,000 to 809,800; (5) to change 558,437 authorized and issued shares of Common

Stock without par value and 1,363 authorized but unissued shares of said Common Stock without par value to 279,900 shares of Class B stock of the par value of $1 per share; (6) to change the remaining 250,000 authorized but unissued shares of said Common Stock without par value into 1,000,000 shares of Class A Stock of the par value of $1 per share; (7) in connection with the changes proposed in (3), (5) and (6), to provide for the issue of scrip certificates representing fractional rights to receive full shares upon combining such scrip certificates with other like scrip certificates representing in the aggregate the right to receive one or more full shares; and (8) to change the name of the Corporation from United Dry Docks, Incorporated to United Shipyards, Inc.; and for the transaction of such other business in connection with the foregoing proposals or in connection with any further action necessary to carry out and put into effect the provisions of said Plan of Reorganization as amended, or otherwise as may properly come before said meeting or any adjournment or adjournments thereof."

(c) At an adjourned session of said meeting, on April 13, 1936, they caused Powell and Rogers, Bates not acting, to vote as proxies for the holders of upwards of two-thirds of the outstanding Preferred and Common stock in favor of amendments to the Certificate of Incorporation creating Class A stock holding the sole right to vote on a proposal to sell the assets of the corporation, said amendments containing language specifically excluding the Class B stock from the right to vote on such a proposal.

(d) At a hearing on April 24, 1936, held on successive adjournments of the hearing of March 27, 1936,

they presented the amendments to the Court for approval, with only the following statement:

> Mr. Rogers * * * "Second, we are asking your Honor to formally approve the amendments to the Certificate of Incorporation which carry out the terms of the Plan, and we are also asking your Honor to adjourn this hearing to the 8th day of May so that we may then report having closed and get such an order as is incident to the situation at that time. * * * With respect to the amendments to the Certificate, I have here the pages from the minute book. Now if your Honor will permit, I would like to substitute in place of these original minutes, copies certified by the Secretary some time during the day."

Said amendments comprised three certificates totalling 41 pages. Later on April 24th, 1936, they procured the Court to sign an order reciting that said amendments were held and determined to be in accordance with the provisions of the Plan, and approving said amendments.

(e) Upon information and belief at no point and in no way did they disclose to the Court that the amendments vested the sole right to vote on a sale of the assets in the Class A stock and specifically excluded the Class B stock from said right. At no hearing were the voting rights of the Class A and Class B shares discussed.

(f) At no point and in no way did they give any notice to the Preferred and Common stockholders.

> (i) that the amendments to be adopted at the special meeting of stockholders and by vote of the proxies would vest the sole right to vote on a sale of the assets

in the Class A stock, except that the provisions of said amendments regarding voting were printed on the backs of the certificates for the Class A and Class B shares, which were distributed after May 5, 1936; or

(ii) that at the hearing of April 24th, the amendments would be submitted to the Court for approval and for an adjudication that they conformed to the Plan.

(g) Upon information and belief the provisions defining the voting rights of the then proposed Class A and Class B stock were completely drafted previous to the hearing on confirmation of the Plan.

52. On May 5, 1936, said amendments, with certificates indicating the adoption thereof at said special meeting were filed in the office of the Secretary of State of the State of New York.

53. The Certificate of Incorporation of UNITED as affected by said amendments provides, and at all times since May 5, 1936 has provided in part as follows with respect to the designations, preferences, privileges and voting powers of the stock of UNITED as reorganized:

(a) DIVIDENDS

The holders of the Class A stock shall be preferentially entitled to receive, out of surplus available for dividends, if, as and when declared by the Board of Directors, dividends at the rate of $1.25 per share per annum. Such dividends shall be non-cumulative, but unless and until paid or declared and set apart in any year, no dividends shall be declared in such year on the Class B stock. After the Preferred dividend on the Class A stock shall

have been declared and set apart in any year, any additional sum set apart for dividend purposes shall be applied two-thirds as an additional dividend on the Class A stock and one-third as dividend on the Class B stock.

(b) PREFERENCE AND OR PARTICIPATION OF CLASS A AND CLASS B STOCK UPON DISTRIBUTION OF ASSETS

In the event of any liquidation, dissolution or winding up of the corporation or any reduction of its capital or capital stock, resulting in the distribution of any assets to stockholders, the holders of the Class A stock shall 92
be preferentially entitled to receive $12.50 per share, plus any dividends declared but unpaid on the Class A stock, before any amount shall be paid or any property or assets distributed on the Class B stock, and thereafter the remaining assets of the corporation available for distribution to stockholders shall be divided among the holders of the Class A stock and the Class B stock pro-rata in accordance with their respective shareholdings, as if the shares of Class A and the shares of Class B were all shares of one class.

(c) REDEMPTION OF CLASS B STOCK

The Class B stock is redeemable at any time at the 93
option of the corporation at $10 per share plus declared but unpaid dividends, Class B shares redeemed to be cancelled and retired and not reissued.

(d) CONVERSION OF CLASS B STOCK INTO CLASS A STOCK

The Class B stock is convertible into Class A stock at any time, share for share, on payment to the corporation of $10 per share. Class B shares so converted shall be cancelled and retired and not reissued.

(e) VOTING RIGHTS OF CLASS A AND CLASS B STOCK

The Class B stockholders shall have the right to elect one director. Except therefor, the holders of the Class A stock shall have the absolute and exclusive voting power. The holders of the Class B stock are specifically excluded from the right to vote on a sale of all or substantially all of the assets of the corporation and on the other matters referred to in section 51 of the New York Stock Corporation Law.

(f) WAIVER OF PREEMPTIVE RIGHTS

No stockholder shall have any preemptive right to subscribe for any authorized but unissued stock or for any new or additional stock or bonds authorized in the future.

54. On May 2, 1938, UNITED, acting through Powell as president and Rogers as secretary, entered into a contract with Bethlehem, hereinafter referred to as "the Bethlehem Contract". The Bethlehem Contract provided for the sale to Bethlehem, for a consideration of $9,300,000. of the plants of UNITED, its inventory of raw materials, its business, good will, plans, drawings, patterns, templates, licenses, tradenames, trademarks, copyrights, all estimating and cost data and records, and the right to use UNITED's corporate name. Said contract provided and provides further that for a period of ten years UNITED will not engage in the business of building, repairing and/or drydocking vessels within 400 miles of New York Harbor.

55. Upon information and belief for the ten years preceding May 2, 1938, there had been practically no new construction of merchant vessels here or abroad except tankers and a few luxury liners. A world wide demand for merchant

and naval vessels was evident, and shipyards in all countries were filled with orders, and existing facilities were inadequate to take care of the business offered. It had been estimated that in order to keep the American Merchant Marine at its existing strength, over one thousand vessels would have to be replaced within the ensuing four years. This country's need for new vessels to replace those rapidly becoming obsolescent in order to maintain the position of the Merchant Marine, and to provide an adequate number of vessels necessary in time of war as auxiliaries to the fleet for other purposes, and the facilities available for building the needed tonnage were studied by Congress, and the Mer- 98
chant Marine Act of 1936 was adopted. Among the provisions of that Act, and the proceedings thereunder, pertinent to an appraisal of the business prospects of UNITED on May 2, 1938, were the following:

(a) A Commission of five members had been created.

(b) The Commission was empowered to advance 75% of the cost of vessels to be constructed, the loans to run for 20 years at 3½% interest, and to make loans for the modernization, improvement and repair of vessels.

(c) The Commission was empowered to absorb the excess costs of American construction and operation of 99
vessels over foreign construction and operation by direct subsidies.

(d) A duty was imposed on the Commission to construct a portion of the needed tonnage on its own account, should private capital fail to do so with the inducements offered.

(e) The Chairman of the Maritime Commission stated at a hearing before the House Committee on

Appropriations that 300 to 350 ships should be built for the overseas trade. As a start toward this end, the Commission had adopted an initial program of construction to be carried out over a period of eighteen months to three years. This program, which had been definitely announced, called for the building of 95 ships, with an estimated deadweight tonnage of 835,000 tons. The list included cargo, passenger ships and tanks, with an estimated cost of over $250,000,000.

(f) The Commission had advertised for bids and had let contracts for twelve cargo vessels at a cost of approximately $24,000,000.

(g) The Chairman of the Commission stated in a public address that with 85% of our merchant vessels "fit for retirement within five years" there could be but "one answer, to build ships—the best and most modern ships—and build them right away". In the opinion of the Chairman, no more enticing field for American capital existed than the shipping industry. He stated, however, should private capital be tardy about availing itself of its opportunities, the Merchant Marine Act empowers the Government to take the initiative in building ships. He added, "the government, with the assistance of the shipping industry, must begin a program which will equip our overseas trade so that it will be second to none in first-class equipment. We are going to lay the keels for new fast ships. And we are going to do it now." (N. Y. Times, May 23rd.)

56. Upon information and belief on May 2, 1938, there was a very substantial probability that there would shortly be a great demand for naval vessels to be built in private yards. The Naval Bill, now a law, authorizing the construc-

tion during the next few years of all classes of ships for the Navy at an aggregate cost of over $1,000,000,000, was then being considered by Congress. UNITED was in a specially favorable position to construct naval vessels, having built a number of destroyers, and certain of its plans and specifications having been accepted by the Navy Department as official, and as the basis for all bids on the type of ship in question. In addition to constructing destroyers, UNITED had bid on at least one light cruiser. 103

57. Upon information and belief, on May 2, 1938, and for some time previous thereto foreign governments were seeking to place orders here for battleships, cruisers and other naval vessels. 104

58. Upon information and belief, on May 2, 1938, due in part at least to the modernization and improvement program of the Maritime Commission and to the necessity for maintaining the new vessels to be constructed, a substantial probability existed that the drydocking and repair business of UNITED would, over the ensuing period, be materially greater and more profitable than at any time during the prior history of the company.

59. On May 2, 1938, the following factors favorably affected the ability of UNITED to prosecute its business profitably and without fear of interruption: 105

(a) its several plants were well located and well equipped to engage competitively in the business of constructing, drydocking, repairing, and effecting structural alterations to vessels and modernizing ves[illegible];

(b) its mortgages and leases had, as aforesaid, been modified and extended on favorable terms, fixed charges

106 *Amended and Supplemental Bill.*

having been drastically reduced and no maturities obtaining until 1946;

(c) its working capital was upwards of $1,000,000;

(d) its credit was good;

(e) its position with respect to labor was good, the management having succeeded in maintaining the principle of open shop in its plants.

Annexed hereto and made a part hereof is the consolidated
107 balance sheet of UNITED and its wholly owned subsidiary as of December 31, 1937.

60. Upon information and belief, the plants of UNITED were appraised by Coverdale & Colpitts at approximately $26,000,000 at the time when the company was launched.

61. Said plants were acquired as of February 28, 1929 at a cost of $18,840,000.

62. In 1933, Sanderson & Porter made for UNITED an appraisal of all or a portion of its properties, but complainants are not advised regarding the scope of said appraisal or the
108 figure arrived at.

63. The value of the plants retained following the rearrangement and consolidation of yards while UNITED was in reorganization as appraised as of February 28, 1929, less depreciation to April 2, 1935, and plus additions at cost to April 2, 1935, was $17,345,135.07.

64. The sound value of the plants of UNITED was appraised as of June 2, 1936 by Baker & Spencer, Inc., Civil Engineers, at $12,329,453.43. Said valuation was accepted

by the Board of Directors of UNITED as the value of the plants as of said date.

65. The value of the plants of UNITED, as so fixed by Baker & Spencer, Inc., with additions at cost, and less amortization and depreciation to December 31, 1937, as accrued in the accounts of the company, was $11,803,276.01.

66. Included in the sale to Bethlehem were inventories other than work in progress, amounting, at lower of cost or market, as of December 31, 1937, to $344,790.68.

67. Upon information and belief, the price fixed in the 110
Bethlehem Contract, $9,320,000, was grossly inadequate.

68. Upon information and belief the sale to Bethlehem was not in the interests of UNITED and of its stockholders generally.

69. Upon information and belief:

Prior to confirmation of the Plan, as aforesaid the Chase Bank held the mortgage on the Shewan Plant and a senior interest in the mortgage on the Crane Plant as security for loans due from Powell and Rogers, a half interest in the mortgage on the property acquired from New York 111
Harbor Dry Dock Company as security for loans due from Aldred & Company, and it owned the mortgage on the Fletcher Plant, and Rogers' company, Moss Estate, Incorporated, held the second mortgage on the Alderton Yard, which he had purchased at approximately twenty cents on the dollar. The two most valuable and profitable plants of UNITED were the Staten Island Plant, where its operations in the construction of new vessels were concentrated, and the Morse Plant, its chief repair plant. As aforesaid, the

New York Harbor Plant had already been closed up and the real estate sold, the Alderton Yard had long since been closed and dismantled, and in the reorganization, the Crane Plant was closed and discontinued. The Chase Bank, Powell, Rogers and Aldred determined that the best opportunity for liquidating their respective interests in the property of UNITED would be by a reorganization in which the Company, of which they were creditors, would continue to have the right to operate the two most valuable plants, the Staten Island and Morse Plants, and the Chase Bank, Powell, Rogers and Aldred would be in a position to sell the entire
113 business and properties of the Company as one unit, including the less valuable plants, when a price should be offered sufficient to cover their respective positions, and conceived and entered into a design to place themselves in a position to effectuate the said purposes, without regard for, and to the detriment of, the rights and interests of UNITED and its stockholders. Pursuant to said design, the Chase Bank, Powell, Rogers and Aldred formulated the Plan, which, as carried out by them as aforesaid, resulted in the issuance of upwards of two-thirds of the Class A stock to or for the account of the Chase Bank, Powell, Rogers, Rogers' company, Moss Estate, Incorporated and Aldred & Company, carrying with it the sole right to vote on a sale of the company's
114 properties, and the right to name all but one member of the Board of Directors. As a further step in said design, the Chase Bank caused Powell and Rogers, its debtors, to open negotiations with Bethlehem in or about May, 1937, two months after entry of the final order terminating the reorganization proceedings. The final steps were the culmination of said negotiations in the Bethlehem Contract, the approval of said contract by the Board of Directors of UNITED, which Board had been named in effect by the Chase Bank, and the ratification thereof by the votes of the Chase Bank, Powell, Rogers, Rogers' company, Moss Estate, Incorporated, and

Aldred & Company as the holders of two-thirds of the Class A stock, at a special meeting of stockholders on May 25, 1935, and transfer of possession of the plants to Bethlehem on June 3, 1938. Assuming UNITED to be dissolved as a result of said sale and the Class A stock to liquidate at the amount of its preference on dissolution, $12.50 per share, the effect of the sale is to

(a) liquidate the balance of the loan due from Powell and Rogers to the Chase Bank which balance amounted to $934,810;

(b) liquidate the loan due from Aldred & Company to the Chase Bank, at least to the extent of $278,112.50;

(c) realize the secret profit of Rogers on the purchase of the Alderton mortgage. If Moss Estate, Incorporated has held the 21,282 shares of Class A stock provided by the Plan to be issued to it in respect of the Alderton mortgage, the profit will be upwards of $185,000;

(d) realize for Powell and Rogers the liquidation premium of 25% on the 178,538 shares of Class A stock issued in respect of their claims for the principal of the Shewan and Crane mortgages, which premiums will amount to $446,345;

(e) realize for Aldred & Company the liquidation premium of 25% on 22,249 shares of Class A stock, issued in respect of their interest in the principal of the New York Harbor Dry Dock Company mortgage, which premium will amount to $55,598;

(f) realize for the Chase bank $668,412.50 out of the Class A shares issued to it on its claim for $499,200 principal and $39,542.40 interest due on the Fletcher mortgage;

(g) realize for the holders of the Staten Island and Morse mortgages, the principal of the mortgages, less a discount of $811,572.06, which discount is extremely moderate in view of the extended maturity, and of the terms of said mortgages, which liberally favor the mortgagor;

(h) wipe out completely the Class B stock.

70. During the period of the negotiations with Bethlehem and the culmination thereof, the seven members of the Board of Directors of UNITED representing the Class A stock, named upon information and belief in effect by the Chase Bank, were Powell, Rogers, Aldred, Hermann G. Place, a vice president of the Chase Bank, Earl G. Hines, a former employee of the Chase Bank and of the Chase Securities Corporation, and representatives of the holders of the mortgages on the Staten Island and Morse plants, respectively George H. Bates, one of the large stockholders in the Staten Island Shipbuilding Company, and Courtland Palmer, attorney for Edward P. Morse, Jr. and others. The so called representative of the Class B stock, chosen by the Proxy Committee of the management and upon information and belief in effect also named by the Chase Bank, was Clarkson Potter, a member of the firm of Hayden, Stone & Company. Neither Mr. Potter nor his firm were stockholders of UNITED, but Hayden, Stone & Company in the Fall of 1937 underwrote with others an issue of $45,000,000 of Bethlehem Steel Corporation debentures. Bethlehem is a subsidiary of Bethlehem Steel Corporation. Upon information and belief, each of said directors had an interest adverse, in the premises, to the corporation, to the stockholders thereof in general, and in particular to complainants as Class B stockholders.

71. Upon information and belief at all times herein mentioned since the reorganization, complainants as Class B

stockholders have had the right to have the business and properties of UNITED operated, subject only to the right of UNITED to sell its assets at a given figure and wind up its affairs, if such course should be found by the Directors to be for the best interest of the corporation and all its stockholders, and should be approved by the holders of two-thirds of the outstanding Class A shares. 121

72. Each of the directors above named, was in the exercise of his powers as such, in general, and in particular in considering the Bethlehem Contract, not a representative of the Class A stock or of the Class B stock, but a trustee for the corporation and all its stockholders, and obliged to act on said contract in such capacity. 122

73. The Chase Bank, Powell, Rogers and Aldred, when they assumed to control the company and its power to sell its properties through exercise of the voting power of two-thirds of the Class A stock to elect seven of the eight members of the Board of Directors and to ratify a contract of sale, placed themselves in a fiduciary position toward the corporation and its other stockholders, and obliged themselves to exercise such power only for the best interests of the corporation and all its stockholders.

74. Upon information and belief in entering into and in effectuating the aforesaid design and more particularly in causing Powell and Rogers to negotiate the Bethlehem Contract, and the Board of Directors to approve the contract, and in voting their two-thirds of the Class A stock in favor of ratification of the contract, the Chase Bank, Powell, Rogers and Aldred acted with the intent of bringing about the effects of the sale alleged in Paragraph 69 hereof in fraud on the interests and rights of UNITED and of the general body of its stockholders, and in particular of complainants. 123

75. The Bethlehem Contract in effect deprives UNITED of the right as well as the means of prosecuting its business, and leaves no alternative to dissolution.

76. The Bethlehem Contract left to UNITED its accounts receivable, its work in progress (to be completed by Bethlehem for the account of UNITED), certain choses in action, certain small parcels of real estate on Staten Island, a real estate mortgage, and sundry other assets, upon information and belief of little worth. If consummation of the Bethlehem Contract has been accomplished without a dollar of expense, and if the assets remaining to UNITED are liquidated without a dollar of shrinkage or expense, there will be for distribution on the Class B stock, per share, 52 cents, each of which shares represents an original investment of $40.

77. Upon information and belief upon completion of the liquidation of said assets there will be nothing for distribution on the Class B stock, and the Class B stock will have no asset value, and the original investment of complainants amounting to upwards of $100,000 will be wholly destroyed unless this Honorable Court shall intervene and grant equitable relief as hereinafter prayed, or as may otherwise seem just.

78. The Bethlehem Contract was specifically subject to ratification by the holders of two-thirds of the Class A stock.

79. Complainants gave notice of their claims to the defendants other than Bethlehem prior to the special meeting of stockholders held on May 25, 1938, at which the Bethlehem Contract was ratified, and to Bethlehem on May 26, 1938.

80. Upon information and belief on June 1, 1938 Bethlehem turned over to UNITED a check for $9,320,000, the

amount of the consideration named in the Bethlehem Contract, but did not deliver said check to UNITED unconditionally under the contract; said check having been delivered under an agreement whereby there would be paid therefrom the amount of the Staten Island and Morse mortgages, and the balance held intact by UNITED pending disposition of the claims of complainants and certain other objecting stockholders.

81. On June 3, 1938, Bethlehem took possession of the plants of UNITED.

82. On June 1, 1938 Bethlehem was on notice that in accepting said check and in agreeing to surrender possessions of said plants, the defendants other than Bethlehem, trustees for the beneficial owners of the properties of UNITED, were acting in fraud upon the rights of said beneficial owners, and that such action was subject to being avoided by such beneficial owners, or some of them, and in particular the complainants, in so far as their rights might otherwise be affected, and Bethlehem knowingly bought no more than the right, title and interest in said assets of the defendants, and of such other stockholders of UNITED as have or may have acquiesced in or adopted the sale.

83. At the special meeting of stockholders held on May 25, 1938 as aforesaid to ratify the Bethlehem Contract, before the vote was taken upon said proposition, complainants NEIRBO, THE A. P. SMITH MANUFACTURING COMPANY and O'BRIEN filed with UNITED statements objecting to said contract and to ratification thereof, and demanding appraisal of, and payment for, their shares.

84. Complainants acted as alleged in Paragraph 83 in order to save their rights under sections 20 and 21 of the New York Stock Corporation Law and did not intend thereby to

waive, and did not waive, their rights asserted in this suit, or any of their other rights or remedies.

85. Complainants have no adequate remedy at law.

WHEREFORE complainants pray:

A. That complainants may be granted leave to file this amended and supplemental bill of complaint, containing matters which transpired after the filing of complainants' original and amended bills, and that the respondents to said amended bill, to wit the defendants other than Bethlehem, may be required to answer this supplemental bill.

B. That Bethlehem may be joined as an additional party defendant and that a supplemental subpoena issue, directed to Bethlehem, requiring Bethlehem to appear and answer this amended and supplemental bill, and be bound by the orders and decrees of the Court in this suit.

C. That it be adjudged and decreed that the defendants are trustees of the equitable interest of complainants in the properties of UNITED, possession of which has been transferred to Bethlehem, and that the defendants shall account to complainants from time to time for the earnings and profit of their said interest.

D. That in the alternative and if this Court shall refuse to grant complainants relief as prayed for in Paragraph C hereof, an order may be made pursuant to sections 20 and 21 of the New York Stock Corporation Law appointing three persons to appraise the value of the stock of complainants NEIRBO, THE A. P. SMITH MANUFACTURING COMPANY and O'BRIEN, as of June 3, 1938 and designating the time and place of the first meeting of said appraisers, with such di-

rections in regard to their proceedings as shall be deemed proper, and that the stock of said complainants shall be appraised by said appraisers pursuant to section 21 of the New York Stock Corporation Law and that said complainants may thereafter have a final order confirming, modifying or rejecting said appraisal as justice and equity may require, and that interest may be awarded on the value of the stock of said complainants from May 25, 1938 and that said complainants may have a decree against UNITED for the payment of the amount finally so fixed.

E. That the complainants may have such other and further relief as to the Court in the premises may seen just and equitable, together with the costs of this suit.

NEIRBO COMPANY,
The A. P. SMITH MANUFACTURING CO.,
DENIS F. O'BRIEN and
EMMA BOURKE, Complainants,
By DENIS F. O'BRIEN.

ROBERT P. WEIL,
Solicitor for Complainants,
50 Broadway,
New York City.

Of Counsel:
LAURENCE A. TANZER,
ROBERT P. WEIL.

136 *Amended and Supplemental Bill.*

UNITED STATES OF AMERICA,
DISTRICT OF NEW JERSEY, } ss.:

DENIS F. O'BRIEN being duly sworn, deposes and says that he is one of the complainants herein, that he has read the foregoing amended and supplemental bill of complaint and knows it to be true except as to the matters alleged therein upon information and belief, and as to those matters he believes it to be true.

DENIS F. O'BRIEN

137 Sworn to before me this
15th day of July, 1938.

W. P. BAERENRODT,
Notary Public.

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Supplemental Citation.

Eq. Vol. 87, page 117.

THE PRESIDENT OF THE UNITED STATES OF AMERICA to United Shipyards, Inc., Joseph W. Powell, Hubert E. Rogers, John E. Aldred, The Chase National Bank of the City of New York and Bethlehem Shipbuilding Corporation, Ltd.

GREETING:

YOU ARE HEREBY COMMANDED to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court, in a suit in Equity, by Neirbo Company, The A. P. Smith Manufacturing Company, Denis F. O'Brien and Emma Bourke, and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you of Two HUNDRED AND FIFTY DOLLARS ($250).

WITNESS, Honorable JOHN C. KNOX, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 27th day of July in the year One Thousand Nine Hundred and Thirty-eight and of the Independence of the United States the One Hundred and Sixty-third.

CHARLES WEISER,
Clerk.

ROBERT P. WEIL,
50 Broadway,
Solicitor.

[SEAL]

The Defendants are required to file their answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken PRO CONFESSO.

CHARLES WEISER,
Clerk.

142 **Marshal's Return of Service on Bethlehem.**

I hereby certify, That on the 28th day of July, 1938, at the City of New York, in my district, I served the within Subpoena in Equity upon the within-named defendant Bethlehem Shipbuilding Corp., Ltd. by exhibiting to William J. Brown, Asst. Secretary at 25 Broadway, N. Y. City the within original, and at the same time leaving with him a copy thereof.

JOHN J. KELLY,
United States Marshal,
Southern District of New York.

148 Dated July 28, 1938.

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Order to Show Cause Why Service of Supplemental Subpoena on Bethlehem Should Not Be Set Aside. 145

(Same Title)

Upon the order of this Court dated July 26, 1938, and filed herein on July 26, 1938, the supplemental equity subpoena herein dated July 27, 1938, the marshal's return of service of said supplemental equity subpoena, dated July 28, 1938, upon the defendant Bethlehem Shipbuilding Corporation, Ltd., the amended and supplemental bill of complaint herein, verified July 15, 1938, the annexed affidavit of William D. Whitney, sworn to August 12, 1938, and upon all the proceedings heretofore had herein and all of the papers heretofore filed herein, and upon motion of Cravath, deGersdorff, 146
Swaine & Wood, solicitors for Bethlehem Shipbuilding Corporation, Ltd., named herein as a defendant, appearing specially herein solely for the purpose of this application and motion,

Let the complainants or their solicitor show cause before this Court at a stated term thereof for the hearing of motions, to be held in Room 506, United States Court House, Foley Square, in the Borough of Manhattan, City and State of New York, on the 23rd day of August, 1938, at ten-thirty o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made and filed herein, setting aside, vacating and quashing the marshal's said return of service upon said Bethlehem Shipbuilding Corporation, Ltd., and setting aside, vacating and quashing the attempted service of said supplemental equity subpoena upon said Bethlehem Shipbuilding Corporation, Ltd., upon the following grounds, among others, to wit: 147

1. Because, as appears from said amended and supplemental bill of complaint, said Bethlehem Shipbuilding Corporation, Ltd., is not a citizen or inhabitant of, nor a resident within the State of New York or the Southern District of New York;

148 *Order to Show Cause Why Service of Supplemental Subpoena on Bethlehem Should Not Be Set Aside.*

2. Because, as appears from said amended and supplemental bill of complaint, said Bethlehem Shipbuilding Corporation, Ltd., is a citizen and inhabitant of, and a resident within, the State of Delaware;

3. Because, as appears from said amended and supplemental bill of complaint, each of the complainants herein is a citizen and inhabitant of, and resident within, the State of New Jersey;

149 4. Because, as appears from said amended and supplemental bill of complaint, neither of the complainants herein is a citizen or inhabitant of, nor a resident within, the State of New York or the Southern District of New York, and said Bethlehem Shipbuilding Corporation, Ltd., is neither a citizen or inhabitant of, nor a resident within, said State of New York or the Southern District of New York; and

5. Because, as appears from said amended and supplemental bill of complaint, this suit is brought in a District of which neither the complainants nor said Bethlehem Shipbuilding Corporation, Ltd., is a citizen, inhabitant or resident;

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and sufficient reason appearing therefor, it is

FURTHER ORDERED, that complainants be, and they hereby are, directed to serve copies of all papers and affidavits to be used in answering this motion upon Messrs. Cravath, deGersdorff, Swaine & Wood, at their office, No. 15 Broad Street, New York, N. Y., at or before one o'clock in the afternoon on August 20, 1938, and sufficient reason appearing therefor, it is

Order to Show Cause Why Service of Supplemental Subpoena on Bethlehem Should Not Be Set Aside.

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FURTHER ORDERED, that the time within which said Bethlehem Shipbuilding Corporation, Ltd., shall be required to appear generally, answer, or make any motion with respect to said amended and supplemental bill of complaint herein be, and it hereby is, extended to and including the 20th day after service upon Messrs. Cravath, deGersdorff, Swaine & Wood at their office aforesaid, of a copy of the order of this Court finally determining this motion, with notice of the filing thereof, if this motion be denied, and sufficient reason appearing therefor, it is

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FURTHER ORDERED, that service of a copy of this order, together with a copy of the annexed affidavit, on complainants' solicitor on August 15th, 1938, shall be deemed sufficient.

Dated, New York, N. Y.
August 13, 1938.

JOHN W. CLANCY,
U. S. D. J.

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154 **Affidavit in Support of Order to Show Cause.**

(Same Title)

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

WILLIAM D. WHITNEY, being duly sworn, deposes and says:

I am an attorney and counselor at law duly admitted to practice in all the courts of the State of New York and in this Court. I am a partner in the firm of Cravath, deGersdorff, Swaine & Wood, solicitors for Bethlehem Shipbuilding Corporation, Ltd. (hereinafter sometimes referred to as Bethlehem) named herein as a party defendant and appearing solely and specially for the purpose of this application
155 and motion.

On or about July 26, 1938, complainants in the above-entitled suit secured an order of this Court which, *inter alia*, (1) approved the filing by said complainants of an amended and supplemental bill of complaint, (2) joined Bethlehem as party defendant and (3) directed the issuance of a supplemental subpoena addressed to Bethlehem. On or about July 28, 1938, a supplemental equity subpoena dated July 27, 1938 was purportedly served on Bethlehem as recited in the marshal's return of service filed herein.

It appears on the face of said amended and supplemental bill of complaint that each of the complainants herein is a citizen and resident of the State of New Jersey (Pars. 1 to
156 4, inclusive) and that Bethlehem is a corporation organized and existing under the laws of the State of Delaware and a citizen and resident of said State (Par. 7). Bethlehem has not appeared generally in this suit, and has not consented to, or in any other manner waived its right to object to, its joinder as a defendant herein.

August 17, 1938 is the twentieth day after the attempted service of said supplemental equity subpoena on Bethlehem. Since the present motion will not be heard or determined until after said date, and since said amended and supplemental bill of complaint is extremely voluminous, I respectfully request that provision be made in the order to show cause hereby requested for an extension of Bethlehem's time to appear generally, answer or make any motion with respect

to said amended and supplemental bill of complaint for twenty days after service upon the solicitors for Bethlehem appearing specially herein of a copy of the order of this Court finally determining the motion brought on by said order to show cause, with notice of the filing thereof, if said motion be denied.

Since, in my opinion, the objection of Bethlehem to the venue of this action is sound as a matter of law, and no legally sufficient answer thereto can be made by complainants, I further request, in order to avoid surprise at the argument of the motion, that the order to show cause hereby applied for contain a provision requiring the complainants to serve copies of all papers and affidavits they shall desire to use in answering this motion upon the solicitors for Bethlehem, appearing specially herein, at or before one P. M. on August 20, 1938.

WHEREFORE, I respectfully request that complainants be directed to show cause why an order should not be made and filed herein setting aside, vacating and quashing the marshal's return of service of the supplemental equity subpoena issued herein upon Bethlehem Shipbuilding Corporation, Ltd. and setting aside, vacating and quashing the attempted service of said supplemental equity subpoena upon said Bethlehem Shipbuilding Corporation, Ltd.

No previous application for the relief requested herein has been made to this or any other Court or Judge.

WILLIAM D. WHITNEY.

Sworn to before me this
12th day of August, 1938.

ARTHUR NEWMAN
Notary Public, Kings County
Kings Co. Clerk's No. 170 Reg. No. 9072
N. Y. Co. Clerk's No. 171 Reg. No. 9N109
Bronx Co. Clerk's No. 15 Reg. No. 37N39
Queens Co. Clerk's No. 1785 Reg. No. 6915
Certificates filed also in
Richmond and Westchester Counties
Commission expires March 30, 1939

160 **Affidavit in Opposition to Bethlehem's Motion.**

(Same Title)

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

ROBERT P. WEIL being duly sworn, deposes and says:

1. I am the solicitor for the complainants herein and make this affidavit in opposition to the motion of the defendant BETHLEHEM SHIPBUILDING CORPORATION, LTD. (hereinafter referred to as "Bethlehem") for an order setting aside service upon Bethlehem of a supplemental subpoena, issued herein pursuant to the order of the Court dated July 26, 1938.

161 2. Upon information and belief: On or about March 6, 1918 Bethlehem, a Delaware corporation, received from the Secretary of State of New York a certificate authorizing Bethlehem to do business in the State of New York and at all times since that date said certificate has been, and now is, held by Bethlehem. To obtain said certificate, Bethlehem, pursuant to due corporate action, filed with the Secretary of State of New York a statement and designation as required by law designating Thomas A. McDonald of 111 Broadway, New York City as the person upon whom process might be served in the State of New York in any action or proceeding against Bethlehem. Said designation remained outstanding as originally filed until on or about June 21,
162 1918 when Bethlehem, pursuant to due corporate action, filed a certificate revoking the designation of Thomas A. McDonald and designating William J. Brown in his place as the person upon whom process might be served in the State of New York in any action or proceeding against Bethlehem. Thereafter, said last mentioned designation has remained outstanding unchanged in all respects except that on June 16, 1922 Bethlehem, pursuant to due corporate action, filed a further certificate changing the address of its principal office in the State of New York from 111 Broadway, New York City to 25 Broadway, New York City, its present address.

3. Upon information and belief: At 25 Broadway, New York City, in the Southern District of New York, Bethlehem has a permanent office at which it regularly transacts its business, and Bethlehem is permanently present in the Southern District of New York for the conduct of its corporate business. In addition to being its chief business office, said office at 25 Broadway is in a factual sense the corporate domicile of Bethlehem, since at that place and at no other place, the Board of Directors of Bethlehem meet to conduct its business, the chief executive officers of the company have their permanent offices, and the chief books and records of a general corporate and business nature are kept.

4. Upon information and belief: Bethlehem, in a factual sense, is not present in the State of Delaware. Its statutory office is a mere nominal one, consisting of a listing with the Corporation Trust Company. Bethlehem has no plants or other property of a substantial and permanent nature in Delaware.

5. Upon information and belief: The acts, with the commissions of which Bethlehem is charged in the amended and supplemental bill of complaint, were performed mainly, if not wholly, in the State of New York and in the Southern District of New York.

ROBERT P. WEIL.

Sworn to before me this
20th day of August, 1938.

HARRY FRANK
Notary Public, Kings Co. No. 138, Reg. No. 245
Cert. filed in N. Y. Co. No. 348, Reg. No. O-F-207
Cert. filed in Bronx Co. No. 12, Reg. No. 79-F-40
Cert. filed in Queens Co. No. 314, Reg. No. 1916
Cert. filed in Richmond County
Cert. filed in Westchester County
My Commission expires March 30, 1940

166 **Certificate of Authority of Bethlehem to do Business in New York.**

STATE OF NEW YORK

OFFICE OF THE

SECRETARY OF STATE

CERTIFICATE OF AUTHORITY
To do business in New York State

IT IS HEREBY CERTIFIED, That BETHLEHEM SHIPBUILDING CORPORATION, LTD., which appears from the papers filed in this office on the sixth day of March, 1918, to be a foreign stock corporation organized and existing under the laws of
167 the State of Delaware, has complied with all the requirements of law to authorize it to do business in this State, and that the business of such corporation to be carried on in this State is such as may be lawfully carried on by a corporation incorporated under the laws of this State for such or similar business.

WITNESS, my hand and the seal of office of the Secretary of State, at the City of Albany, this 6th day of March, 1918.

C. W. TAFT,
(L. S.) Second Deputy Secretary of State.

STATE OF NEW YORK
168 DEPARTMENT OF STATE } ss.:

I CERTIFY That I have compared the preceding copy with the record in this department of the certificate of authority issued on the 6th day of March, 1918, to the BETHLEHEM SHIPBUILDING CORPORATION, LTD., and that such copy is a correct transcript therefrom and of the whole of such record.

WITNESS my hand and the official seal of the Department of State, at the City of Albany, this eighteenth day of August, one thousand nine hundred and thirty-eight.

FRANK S. SHARP,
(Seal) Deputy Secretary of State.

Statement and Designation by Bethlehem.

STATE OF NEW YORK

TAX DEPARTMENT

ALBANY, Mar. 5, 1918.

THE HONORABLE THE SECRETARY OF STATE
ALBANY, N. Y.

DEAR SIR:

Enclosed herewith please find application of Bethlehem Shipbuilding Corp. Ltd. of Delaware, for a certificate to do business in the State of New York.

As the above-mentioned company has not been doing business in the State of New York for a period of one year, the amount of capital upon which the license fee is based will not be determined until the expiration of the time provided by Section 181, Chapter 908, Laws of 1896, and acts amendatory thereof.

Respectfully yours,

JOHN J. MERRILL,
Tax Commissioner.

(Enclosure)

BETHLEHEM SHIPBUILDING CORPORATION, LTD.
STATEMENT AND DESIGNATION.

(Pursuant to Section 16 of the General Corporation Law of the State of New York).

Pursuant to the provisions of Section 16 of the General Corporation Law of the State of New York, Bethlehem Shipbuilding Corporation, Ltd., a stock corporation, organized and existing under and by virtue of the laws of the State of

172 *Statement and Designation by Bethlehem.*

Delaware, does hereby make a statement and designation under its corporate seal to be filed with the annexed sworn copy of its amended certificate of incorporation, as follows, to-wit:

FIRST: The business or objects of said Corporation, which it is engaged in carrying on, or which it proposes to carry on, within the State of New York, are as follows:

(a) To design, build, construct, repair, operate, maintain, buy, sell, charter or otherwise manage, deal or traffic in ships, boats and vessels of all kinds, and their
178 equipment, furnishings and appurtenances, armor and armament, boilers, engines, tackle and apparel; together with all materials, articles, tools, machinery, docks and appliances entering into or suitable and convenient for the construction, equipment, maintenance or operation thereof.

(b) To construct or purchase or otherwise acquire, buildings, machinery, engines, apparatus, locomotives, cars, railroad equipment, railroads, docks, slips, elevators, water works, gas works, electric works, bridges, viaducts, acqueducts, canals and any other waterways and any other means of transportation, and to sell or
74 otherwise dispose thereof, or to maintain or operate the same.

(c) To manufacture, buy, sell or otherwise deal or traffic in ordinance, large and small arms, armor, armor plate, explosives, munitions and stores of war; and military, naval, maritime, marine and submarine materials, substances, appliances, engines, articles and contrivances of any and every sort.

(d) To manufacture, buy, sell or otherwise deal or traffic in, iron, steel, manganese, nickel, copper, coke,

coal, lumber and other metals, minerals or materials, and all or any products or articles consisting or partly consisting of iron, steel, manganese, nickel, copper, coal, coke, lumber or other metals, minerals or materials.

(e) To acquire, own, lease, occupy, use, develop, or deal in, any lands containing coal, iron, manganese, nickel, copper, stone, or other ores or minerals, gas or oil, and in wood lands or other lands; and to mine or otherwise extract or to remove, coal, ores, stone, timber, gas, oil or other minerals, materials or substances from any lands.

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(f) To transport goods, merchandise and passengers upon land or water; to own, operate and maintain steamship lines, vessel or other lines for water transportation; to construct, purchase, lease or otherwise acquire, maintain, operate or use wharves, warehouses, piers, docks, dry-docks, floating-docks, and all other structures, buildings or works.

SECOND: The place within the State of New York which is to be the principal place of business of said Corporation is No. 111 Broadway, Borough of Manhattan, City of New York.

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THIRD: Said Corporation hereby designates Thomas A. McDonald as the person upon whom a summons may be served within the State of New York, or any process or other paper whereby a special proceeding is commenced in a court or before an officer, except a proceeding to punish for contempt and except where special provision for the service thereof is otherwise made by law.

FOURTH: Said Thomas A. McDonald, so designated, has an office and place of business at No. 111 Broadway, in the Borough of Manhattan, City of New York, the place where

178 *Statement and Designation by Bethlehem.*

said Corporation is to have its principal place of business within the State of New York, as aforesaid.

FIFTH: The written consent of said Thomas A. McDonald to such designation, duly signed and acknowledged, is hereto annexed.

IN WITNESS WHEREOF, Bethlehem Shipbuilding Corporation, Ltd., the Corporation hereinbefore mentioned and described, has caused this instrument to be executed by its President, or one of its Vice-Presidents, and its corporate seal to be hereunto affixed and attested by its Secretary or
179 one of its Assistant Secretaries, this 13th day of February, 1918.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.,

By J. W. POWELL,
Vice President.

Attest:
R. W. ROBERTS,
Assistant Secretary.

(Seal)

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Statement and Designation by Bethlehem. 181

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF NORTHAMPTON, } ss.:

On the 13th day of February, in the year 1918, before me personally came J. W. Powell, to me known, who, being by me duly sworn, did depose and say: That he resides in Bethlehem, Commonwealth of Pennsylvania; that he is the Vice President of Bethlehem Shipbuilding Corporation, Ltd., the corporation described in and which executed the above instrument; that he knows the seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by like order. 182

H. M. WITEMEYER,
Notary Public.
Commission expires at end of next session of Senate.

(Seal)

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF NORTHAMPTON, } ss.:

On the 13th day of February, in the year 1918, before me personally came J. W. Powell, to me known, who, being by me duly sworn, did depose and say: That he resides in Bethlehem, Commonwealth of Pennsylvania; that he is the Vice President of Bethlehem Shipbuilding Corporation, Ltd., the corporation described in and which executed the above instrument; that he knows the seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by like order. 183

H. M. WITEMEYER.

184 *Statement and Designation by Bethlehem.*

STATE OF PENNSYLVANIA,
COUNTY OF NORTHAMPTON, } ss.:

I, THOMAS A. L. HAY, Prothonotary in and for the County of Northampton and Clerk of the Court of Common Pleas, do hereby certify, that the said Court is a Court of Record; that I have official cognizance of the fact, that H. M. WITEMEYER, Esq., before whom the foregoing was taken, was at the time of taking such, a NOTARY PUBLIC in and for said County, and a resident thereof, duly commissioned and qualified and duly authorized and empowered to take and certify oaths and affirmations
185 (Seal) and the proof and acknowledgment of deeds by the laws of said State of Pennsylvania. And further, that I am well acquainted with the hand-writing of such NOTARY PUBLIC and verily believe that the signature to the said acknowledgment is genuine. I further certify, that the said instrument is executed and acknowledged in all respects according to the laws of the State of Pennsylvania. That his commission is dated September 7th, 1917, and will expire at end of next session of Senate.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said office, at Easton, this 13th day of February, A. D. 1918.

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THOMAS A. L. HAY,
Prothonotary.

I, Thomas A. McDonald, the person designated in the foregoing instrument as the person upon whom a summons, or any process as therein mentioned, against Bethlehem Shipbuilding Corporation, Ltd., may be served within the State of New York, do hereby consent to such designation.

IN WITNESS WHEREOF, I have hereunto set my hand this 18th day of February, 1918.

T. A. MCDONALD

Statement and Designation by Bethlehem. 187

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

On this 18th day of February, 1918, before me personally came THOMAS A. MCDONALD, to me known and known to me to be the person described in and who signed the foregoing consent, and he duly acknowledged to me that he signed and executed the same.

J. H. WARD
Notary Public, Kings County No. 87
Certificate filed in New York Co. No. 180 188
New York County Register No. 8161
Commission expires March 30, 1918

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190 *Statement and Designation by Bethlehem.*

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE.

CERTIFICATE OF INCORPORATION,

As Modified and Amended

by

191 Agreement and Indenture of Consolidation, dated October 30, 1917.

CERTIFICATE OF INCORPORATION

OF

BETHELEHEM SHIPBUILDING CORPORATION, LTD.

As Modified and Amended by Agreement and Indenture of Consolidation, dated October 30, 1917.

192 We, the undersigned, for the purpose of associating to establish a corporation for the transaction of the business and the promotion and conduct of the objects and purposes hereinafter stated, under the provisions of, and subject to the requirements of, the laws of the State of Delaware (particularly an act entitled "An Act providing a General Corporation Law," approved March 10, 1899, and the acts amendatory thereof and supplemental thereto, and known as the "General Corporation Law of the State of Delaware"), do make, record and file this certificate of incorporation in writing and do hereby certify as follows to wit:

Statement and Designation by Bethlehem.

FIRST: The name of the corporation is BETHLEHEM SHIPBUILDING CORPORATION, LTD.

SECOND. The respective names of the county and of the city within the county in which the principal office and place of business of the corporation is to be located in the State of Delaware are the County of New Castle and City of Wilmington. The name of the resident agent of the corporation in charge thereof upon whom legal process against the corporation may be served is Corporation Trust Company of America. The street and number of said principal office and place of business and the address by street and number of said resident agent is Number 7 West Tenth Street in said City of Wilmington.

THIRD. The nature of the business of the corporation and the objects and purposes to be transacted, promoted or carried on by it are as follows:

(*a*) To design, build, construct, repair, operate, maintain, buy, sell, charter or otherwise manage, deal or traffic in ships, boats and vessels of all kinds, and their equipment, furnishings and appurtenances, armor and armament, boilers, engines, tackle and apparel; together with all materials, articles, tools, machinery, docks and appliances entering into or suitable and convenient for the construction, equipment, maintenance or operation thereof.

(*b*) To construct or purchase or otherwise acquire, buildings, machinery, engines, apparatus, locomotives, cars, railroad equipment, railroads, docks, slips, elevators, water works, gas works, electric works, bridges, viaducts, aqueducts, canals and any other waterways and any other means of transportation, and to sell or otherwise dispose thereof, or to maintain or operate the same.

196 *Statement and Designation by Bethlehem.*

(*c*) To manufacture, buy, sell or otherwise deal or traffic in ordinance, large and small arms, armor, armor plate, explosives, munitions and stores of war; and military, naval, maritime, marine and submarine materials, substances, appliances, engines, articles and contrivances of any and every sort.

(*d*) To manufacture, buy, sell or otherwise deal or traffic in, iron, steel, manganese, nickel, copper, coal, coke, lumber and other metals, minerals or materials, and all or any products or articles consisting or partly
197 consisting of iron, steel, manganese, nickel, copper, coal, coke, lumber or other metals, minerals or materials.

(*e*) To acquire, own, lease, occupy, use, develop or deal in, any lands containing coal, iron, manganese, nickel, copper, stone, or other ores or minerals, gas or oil, and in wood lands or other lands; and to mine or otherwise extract or to remove, coal, ores, stone, timber, gas, oil or other minerals, materials or substances from any lands.

(*f*) To transport goods, merchandise and passengers upon land or water; to own, operate and maintain steamship lines, vessels or other lines for water transportation
198 tion; to construct, purchase, lease or otherwise acquire, maintain, operate or use wharves, warehouses, piers, docks, dry-docks, floating-docks, and all other structures, buildings or works.

(*g*) To apply for, obtain, register, purchase, lease or otherwise to acquire, and to hold, use, own, exercise, develop, operate and introduce, and to sell, assign, grant licenses in respect of, or otherwise dispose of, any trade marks, trade names, patents, or inventions, improve-

ments or processes used in connection with or secured under letters patent of the United States or elsewhere, or otherwise, in relation to any of the other purposes herein stated; and to acquire, use, exercise, or otherwise turn to gain licenses in respect of any such trade marks, patents, inventions, processes and the like or any such property or rights.

(*h*) To engage in any manufacturing, mining, construction, transportation or other business connected with any of the purposes herein stated, but not to engage in any business hereunder which shall require the exercise of the right of eminent domain within the State of Delaware.

(*i*) To enter into any contracts or arrangements with any government or authority, national, state, municipal, local or otherwise, conducive to the other purposes herein stated, and to obtain from any such government or authority any and all rights, privileges, grants or concessions relating to any of the objects herein stated; to carry out, exercise, comply with and enforce any such contracts, rights, privileges and concessions; to subscribe for, acquire, invest in, sell or dispose of any bonds, securities or obligations of any nature issued by any such government or authority or guaranteed thereby.

(*j*) To borrow money; to issue bonds, debentures or obligations of the corporation from time to time, for moneys borrowed or in payment for property purchased or for any of the other objects or purposes of the corporation; to secure the same by mortgage or mortgages or deed or deeds of trust upon or pledge of any or all of the property, rights, privileges, or franchises of the corporation, wheresoever situated, acquired or to be acquired;

202 *Statement and Designation by Bethlehem.*

and to sell or otherwise dispose of any or all such bonds, debentures and obligations.

(*k*) To conduct its business in all or any of its branches in the State of Delaware and in other States of the United States of America, and in the territories and the District of Columbia, and in any or all dependencies, colonies or possessions of the United States of America, and in foreign countries; and for or in connection with such business, to hold, possess, purchase, mortgage and convey real and personal property and to maintain offices and agencies either within or anywhere without the State of Delaware.

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(*l*) The board of directors shall have plenary power and discretion to sell, lease or otherwise dispose of, from time to time, any part or parts of the properties of the corporation and to cease to conduct the business connected therewith or again to resume the same, as it may deem best.

It is the intention that the objects and purposes specified in the foregoing clause of this Article Third, shall, except where otherwise expressed in this Article, be in no wise limited or restricted by reference to, or inference from, the terms of any other clause of this or any other article in this certificate, but that the objects and purposes specified in each of the clauses of this Article shall be regarded as independent objects and purposes.

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It is also the intention that said clauses be construed as powers as well as objects and purposes; and, generally, that the corporation shall be authorized to exercise and enjoy all other powers, rights and privileges granted by the aforesaid act, entitled "An Act providing a General Corporation Law," which was approved March

10, 1899, to corporations of this character, and all the powers conferred upon such corporations by the then existing laws of the State of Delaware, so far as not in conflict therewith, or which may be conferred by all acts heretofore or hereafter amendatory of said Act of March 10, 1899, or of said laws, or supplemental thereto, but the enumeration of certain powers as herein specified is not intended as exclusive of, or as a waiver of, any of the powers, rights or privileges granted or conferred by said Act of March 10, 1899, or the laws of said State now or hereafter in force; provided, however, that the corporation shall not have the power to carry on the business of constructing, maintaining or operating railroads or railways within the State of Delaware; nor shall it possess the right of taking and condemning lands in the State of Delaware. The corporation shall not carry on any business, nor exercise any powers, in any state, territory or country, which a similar corporation organized under the laws of such state, territory or country could not carry on or exercise, except to the extent permitted or authorized by the laws of such state, territory or country.

FOURTH. The amount of the total authorized capital stock of the corporation is Fifteen million five hundred thousand dollars ($15,500,000), the number of shares into which the same is divided is One hundred and fifty-five thousand (155,000), and the par value of each share thereof is One hundred dollars ($100). The amount of capital stock with which the corporation will commence business is One hundred thousand dollars ($100,000).

FIFTH. The name and place of residence of each of the original subscribers to the capital stock and the number of shares subscribed for by each are as follows:

Statement and Designation by Bethlehem.

Names	Places of Residence	Number of Shares of Capital Stock
A. N. Roberts,	Bethlehem, Penn.	340
H. R. Walters,	do do	330
W. L. Lewis,	do do	330

SIXTH. The corporation is to have perpetual existence.

SEVENTH. The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever, except as may be otherwise expressly provided by law.

EIGHTH: The number of directors of the corporation shall be fixed from time to time by the by-laws, but shall not be less than three.

NINTH: The following provisions are hereby adopted for the regulation of the business and the conduct of the affairs of the corporation and for the purpose of creating, defining and regulating the powers of the directors and of the stockholders:

(*a*) The board of directors shall have the power to make, alter, amend and repeal the by-laws of the corporation. Any by-laws of the corporation, whether made by the board of directors or by the stockholders, may be altered or repealed by the stockholders.

(*b*) Subject to the provisions of the by-laws, the board of directors shall have power to fix, from time to time, the amount of the profits of the corporation to be reserved as working capital or for any other lawful purpose.

(*c*) The board of directors shall have power to determine, from time to time, whether and to what extent

and at what times and places and under what conditions and regulations the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders; and no stockholder shall have any right to inspect any account or book or document of the corporation, except as conferred by the laws of the State of Delaware, unless and until authorized so to do by resolution of the board of directors or stockholders of the corporation.

(*d*) The board of directors shall have power, without the assent or vote of the stockholders, to authorize and to cause to be executed mortgages and liens upon the real and personal property of the corporation, including after-acquired property. 212

(*e*) The board of directors shall have power to sell, lease or exchange all of the property and assets of the corporation, including its good-will and its corporate franchises, upon such terms and conditions as the board shall deem expedient and for the best interests of the corporation, when and as authorized by the affirmative vote of the holders of a majority of the stock issued and outstanding given at a stockholders' meeting duly called for that purpose, or when authorized by the written consent of a majority of the holders of the stock issued and outstanding. 213

(*f*) Any director or any officer elected or appointed by the stockholders or by the board of directors may be removed at any time in such manner as shall be provided in the by-laws of the corporation.

(*g*) Elections shall be by ballot whenever requested by any person entitled to vote, but unless so requested may be conducted in any way approved at the meeting of the stockholders at which such election is held.

14 *Statement and Designation by Bethlehem.*

(*h*) The stockholders shall have power to hold their meetings within or without the State of Delaware at such places as from time to time may be designated by the by-laws or as therein provided; and the board of directors shall have power to hold its meetings at such places whether within or without said State as from time to time shall be designated by resolution of the board.

(*i*) The corporation shall have power, subject to the provisions of the laws of the State of Delaware and of the by-laws of the corporation, to keep the books of the corporation outside of said State at such places as may 15 from time to time be designated by resolution of the board of directors.

(*j*) In addition to the powers and authorities hereinbefore or by statute expressly conferred upon them, the board of directors may exercise all such powers and do all such acts and things as may be exercised or done by the corporation; subject, nevertheless, to the provisions of the laws of the State of Delaware, of this certificate, and of the by-laws of the corporation.

TENTH: No contract or other transaction between this corporation and any other corporation and no act of this corpo- 16 ration shall in any way be affected or invalidated by the fact that any of the directors of this corporation are pecuniarily or otherwise interested in, or are directors or officers of, such other corporation; any director individually, or any firm of which any director may be a member, may be a party to, or may be pecuniarily or otherwise interested in, any contract or transaction of this corporation, provided that the fact that he or such firm is so interested shall be disclosed or shall have been known to the board of directors or a majority thereof; and any director of this corporation who is also a director or officer of such other corporation or who is so in-

terested may be counted in determining the existence of a quorum at any meeting of the board of directors of this corporation which shall authorize any such contract or transaction, and may vote thereat to authorize any such contract or transaction, with the like force and effect as if he were not such director or officer of such other corporation or not so interested.

IN WITNESS WHEREOF, we, the undersigned, being all of the original subscribers to the capital stock hereinbefore mentioned, do certify that the facts hereinbefore stated are true, and do respectively agree to take the number of shares of 218 stock hereinbefore set opposite our respective names, and have accordingly hereunto set our respective hands and seals this 15th day of October, nineteen hundred and seventeen.

A. N. ROBERTS [SEAL.]
H. R. WALTERS [SEAL.]
W. L. LEWIS [SEAL.]

In the presence of:
S. WOODWARD

219

220 *Statement and Designation by Bethlehem.*

STATE OF DELAWARE,
COUNTY OF NEW CASTLE, } ss.:

BE IT REMEMBERED, that on this 15th day of October, A. D. 1917, personally appeared before me Charles G. Guyer, a Notary Public in and for the County and State aforesaid, A. N. Roberts, H. R. Walters, and W. L. Lewis, parties to the foregoing certificate of incorporation, known to me personally to be such, and I having first made known to them and each of them the contents of said certificate, they did each severally acknowledged said certificate to be the act and
221 deed of the signers, respectively, and that the facts therein stated are truly set forth.

Given under my hand and seal of office the day and year last aforesaid.

CHARLES G. GUYER,
Notary Public.

CHARLES G. GUYER,
Notary Public,
Appointed February 10, 1915
State of Delaware
Term Four Years

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COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF NORTHAMPTON, } ss.:

A. N. ROBERTS, being duly sworn, deposes and says, that he is an Assistant Secretary of BETHLEHEM SHIPBUILDING CORPORATION, LTD., a corporation organized under the Laws of the State of Delaware, and that the foregoing is a true and complete copy of the amended Certificate of Incorporation of said Corporation as last amended.

A. N. ROBERTS

Subscribed and sworn to before me this 13th day of February, 1918. } 224

H. M. WITEMEYER
Notary Public
Commission expires at end of next session of Senate.

(Seal)

STATE OF NEW YORK
DEPARTMENT OF STATE } ss.:

I CERTIFY That I have compared the preceding copy with the original Statement and Designation by Bethlehem Shipbuilding Corporation, Ltd., filed in this department on the 6th day of March, 1918, and that such copy is a correct transcript therefrom and of the whole of such original. 225

WITNESS my hand and the official seal of the Department of State, at the City of Albany, this twentieth day of August, one thousand nine hundred and thirty-eight.

FRANK S. SHARP,
Deputy Secretary of State.

226 *Statement and Designation by Bethlehem.*

STATE OF PENNSYLVANIA, }
COUNTY OF NORTHAMPTON, } ss.:

I, THOMAS A. L. HAY, Prothonotary in and for the County of Northampton and Clerk of the Court of Common Pleas, do hereby certify, that the said Court is a Court of Record; that I have official cognizance of the fact, that H. M. Witemeyer, Esq., before whom the foregoing was taken, was at the time of taking such, a NOTARY PUBLIC in and for said County, and a resident thereof, duly commissioned and qualified and duly authorized and empowered to take and
227 certify oaths and affirmations and the proof and acknowledgment of deeds by the laws of said State of Pennsylvania. And further, that I am well acquainted with the hand-writing of such NOTARY PUBLIC and verily believe that the signature to the said acknowledgment is genuine. I further certify, that the said instrument is executed and acknowledged in all respects according to the laws of the State of Pennsylvania. That his commission is dated September 7th, 1917, and will expire at end of next session of Senate.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said office, at Easton, this 13th day of February, A. D. 1918.

228

THOMAS A. L. HAY,
Prothonotary.

(Seal)

Certificate of Revocation and New Designation.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

Revocation of Designation.

(Pursuant to Section 16 of the General Corporation Law of the State of New York.)

Pursuant to the provisions of Section 16 of the General Corporation Law of the State of New York, Bethlehem Shipbuilding Corporation, Ltd., a stock corporation, organized and existing under and by virtue of the laws of the State of Delaware, under its corporate seal, does hereby revoke the designation heretofore made by virtue of a Statement and Designation under date of February 13, 1918, and does hereby make a designation in lieu thereof, as follows to wit:

FIRST: Said corporation hereby revokes the designation of Thomas A. McDonald as the person upon whom summons may be served within the State of New York, or any process or other paper whereby a special proceeding is commenced in a court or before an officer, as set forth in paragraph THIRD of said Statement and Designation.

SECOND: The place of business within the State of New York which is to be the principal place of business of said corporation is No. 111 Broadway, Borough of Manhattan, City of New York.

THIRD: Said corporation hereby designates William J. Brown as the person upon whom a summons may be served within the State of New York, or any process or other paper whereby a special proceeding is commenced in a court or before an officer, except a proceeding to punish for contempt and except where special provision for the service thereof is otherwise made by law.

FOURTH: Said William J. Brown, so designated, has an office and place of business at No. 111 Broadway, Borough of Manhattan, City of New York, the place where said cor-

poration is to have its principal place of business within the State of New York, as aforesaid.

FIFTH: The written consent of said William J. Brown to such designation, duly signed and acknowledged, is hereto annexed.

IN WITNESS WHEREOF, Bethlehem Shipbuilding Corporation, Ltd., the corporation hereinbefore mentioned and described, has caused this instrument to be executed by its President, or one of its vice-presidents and its corporate seal to be hereunto affixed, this 14th day of June, 1918.

233 BETHLEHEM SHIPBUILDING CORPORATION, LTD.,

J. W. POWELL
Vice-President (SEAL)

Attest:
A. N. ROBERTS,
Assistant Secretary.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF NORTHAMPTON, } ss.:

On the 14th day of June, 1918, before me personally came J. W. Powell, to me known, who, being by me duly sworn, did depose and say: That he resides in Bethlehem, Pennsylvania; that he is the Vice President of Bethlehem Shipbuilding Corporation, Ltd., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by like order.

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H. M. WITMEYER,
Notary Public,
Commission expires at end of next session of Senate

Certificate of Revocation and New Designation.

STATE OF PENNSYLVANIA,
COUNTY OF NORTHAMPTON, } ss.:

I, THOMAS A. L. HAY, Phothonotary in and for the County of Northampton and Clerk of the Court of Common Pleas, do hereby certify, that the said Court is a Court of Record; that I have official cognizance of the fact, that H. M. WITEMEYER, Esq., before whom the foregoing was taken, was at the time of taking such, a NOTARY PUBLIC in and for said County, and a resident thereof, duly commissioned and qualified and duly authorized and empowered to take and certify oaths and affirmations and the proof and acknowledgment of deeds by the laws of said State of Pennsylvania. And further, that I am well acquainted with the hand-writing of such NOTARY PUBLIC and verily believe that the signature to the said acknowledgment is genuine. I further certify, that the said instrument is executed and acknowledged in all respects according to the laws of the State of Pennsylvania. That his commission is dated September 7th, 1917, and will expire at end of next session of Senate.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said office, at Easton, this 15th day of June A. D. 1918.

THOMAS A. L. HAY,
Prothonotary.

(SEAL)

I, William J. Brown, the person designated in the foregoing instrument, as the person upon whom a summons, or any process as therein mentioned, against Bethlehem Shipbuilding Corporation, Ltd., may be served within the State of New York, do hereby consent to such designation.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of June, 1918.

WM. J. BROWN.

238 *Certificate of Revocation and New Designation.*

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On this 12th day of June, 1918, before me personally came William J. Brown, to me known and known to me to be the person described in and who signed the foregoing consent, and he duly acknowledged to me that he signed and executed the same.

J. H. WARD,
Notary Public.

239 Notary Public, Kings County, No. 65
Kings County Register No. 159
Certificate filed in New York Co. No. 176
New York County Register No. 10140
Commission expires March 30, 1920

(L. S.)

STATE OF NEW YORK }
DEPARTMENT OF STATE } ss.:

I CERTIFY That I have compared the preceding copy with the original Certificate of Revocation and New Designation
240 of Bethlehem Shipbuilding Corporation, Ltd., filed in this department on the 21st day of June, 1918, and that such copy is a correct transcript therefrom and of the whole of such original.

WITNESS my hand and the official seal of the Department of State at the City of Albany, this twentieth day of August, one thousand nine hundred and thirty-eight.

FRANK S. SHARP,
Deputy Secretary of State.

Certificate of Change of Address.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

Certificate of Change of Address.

BETHLEHEM SHIPBUILDING CORPORATION, LTD., a stock corporation of the State of Delaware, duly licensed to do business in the State of New York under date of March 6th, 1918, HEREBY CERTIFIES that the place within the State of New York which is to be its principal place of business, has been changed from No. 111 Broadway, in the Borough of Manhattan, City of New York, to No. 25 Broadway, in said Borough; and that the office or place of business of William J. Brown, the person heretofore designated by said Corporation as the person upon whom process against the corporation may be served within the State of New York has also been changed from No. 111 Broadway, in the Borough of Manhattan, City of New York, to No. 25 Broadway, in said Borough.

IN WITNESS WHEREOF, said BETHLEHEM SHIPBUILDING CORPORATION, LTD., has caused this certificate to be signed in its name by its President or one of its Vice Presidents and its corporate seal to be hereunto affixed and attested by its Secretary or one of its Assistant Secretaries this 12th day of June, 1922.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

By H. S. SNYDER,
Vice President.

(L. S.)

Attest:
R. E. MCMATH,
Secretary.

244 *Certificate of Change of Address.*

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF NORTHAMPTON, } ss.:

On this 12th day of June, in the year 1922, before me personally came H. S. Snyder to me known, who, being duly sworn, did depose and say that he resided in Bethlehem, Pennsylvania; that he is the Vice President of BETHLEHEM SHIPBUILDING CORPORATION, LTD., the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by
245 order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

H. M. WITEMEYER,
Notary Public.
Commission expires April 1. 1923.

(L. S.)

246

Stipulation As To Record.

(Same Title)

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the notice of appeal, the order appealed from, the opinion of the Court in making the order appealed from and all of the papers which were before the Court in making the order appealed from.

Dated, New York, February , 1939.

ROBERT P. WEIL,
Solicitor for Appellants.

CRAVATH, deGERSDORFF, SWAINE & WOOD,
Solicitors for Appellee, appearing specially.

250 **Clerk's Certificate.**

(Same Title)

I, CHARLES WEISER, Clerk of the District Court of United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the notice of appeal, the order appealed from, the opinion of the Court in making the order appealed from and all of the papers which were before the Court in making the order appealed from, all of which papers are on file in said District Court, as stipulated by the parties.

In testimony whereof, I have caused the seal of the said
251 Court to be hereunto annexed at the Borough of Manhattan, City of New York, in the Southern District of New York, this day of February in the year of our Lord one thousand nine hundred and thirty nine and of the Independence of the United States, one hundred and sixty fourth.

CHARLES WEISER,
Clerk

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[fol. 85] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

NEIRBO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, DENIS F. O'BRIEN, and EMMA BOURKE, Appellants,

v.

BETHLEHEM SHIPBUILDING CORPORATION, LTD., Appellee, and United Shipyards, Inc., Joseph W. Powell, Hubert E. Rogers, John E. Aldred, and The Chase National Bank of the City of New York, Defendants

Before L. Hand and Clark, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York; Francis G. Caffey, Judge

Action by the Neirbo Company and others, stockholders of United Shipyards, Inc., to restrain the Shipyards corporation from carrying out a contract for the sale of shipyards and other property to Bethlehem Shipbuilding Corporation, Ltd., wherein the Shipbuilding corporation was later added as a party defendant. From an order dismissing the Shipbuilding corporation as a defendant, because it was not a resident of the District, plaintiffs appeal.

Affirmed.

Robert P. Weil, of New York City (Laurence A. Tanzer, of New York City, of counsel) for appellants.

William Dwight Whitney, of New York City (Cravath, deGersdorff, Swaine & Wood and Robert D. Blasier, both of New York City, of counsel) for appellee.

CLARK, Circuit Judge:

This appeal assigns error in the action of the District Court in granting the motion of Bethlehem Shipbuilding [fol. 86] Corporation, Ltd., to quash service of process upon it and in dismissing the action as to it on the ground that it was not a resident of the Southern District of New York within the requirements of the federal venue statute, Jud. Code, § 51, 28 U. S. C. A. § 112. Appellants, plaintiffs below, ground their appeal on two claims: first, that appellee, the Bethlehem corporation, is a resident of the District, notwith-

standing its incorporation in the State of Delaware, because of the location of its chief business and executive offices within the District and its designation of an agent to accept process there, in compliance with the conditions under which a foreign corporation is legally permitted to do business within the State of New York, and second, that such designation of an agent to accept process in connection with appellee's qualification to do business in New York is a waiver of the venue defense. In the light of the statutory language and of the well settled rule that lack of venue is a personal privilege which a defendant can waive, a reversal of the order of dismissal would become necessary if either the claim of residence in the district or that of waiver could be sustained. But whatever objections of policy may be urged against it, we feel the law to the contrary is too well established to be now overturned.

The action was originally brought by the appellants, who are citizens and residents of New Jersey, against United Shipyards, Inc., a New York corporation of which they are stockholders, to restrain the carrying out by the latter of a contract for the sale of drydocks in the waters of New York Harbor and other property to Bethlehem Shipbuilding Corporation, Ltd. The court refused to stay the sale, but added certain other persons as parties on the plaintiffs' motion. Then the plaintiffs filed an amended and supplemental bill alleging the consummation of the sale and praying relief in respect thereof. In this bill they asked that the Bethlehem corporation be added, and they described it as "a corporation organized and existing under the laws of the State of [fol. 87] Delaware, and * * * a citizen and resident of the State of Delaware." The court ordered that Bethlehem be added as a defendant. Upon being served with process, Bethlehem appeared specially and moved to quash the service and the Marshal's return thereof. The appeal is taken from the order granting Bethlehem's motion and dismissing the action as to it.

The material provisions of Jud. Code, § 51, 28 U. S. C. A. § 112, applicable to this action are as follows:

"* * * no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where jurisdiction is founded only on the fact that the action is between citizens of different States,

suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Since jurisdiction of the present action is founded on the diversity of citizenship of the parties, the latter part of this statute applies. It is settled, however, that except for the limitation of suit to a single district—that whereof the defendant is an inhabitant—in suits other than those based on diversity of citizenship, the requirements of the two parts of the statute are identical, and precedents as to one part are equally authoritative as to the other. In re Keasbey and Mattison Co., 160 U. S. 221. The defense of lack of venue was open to this defendant, notwithstanding the presence in the action of other defendants properly sued in the district. Camp v. Gress, 250 U. S. 308; McLean v. State of Mississippi, 5 Cir., 96 F. 2d 741, cert. den. 59 S. Ct. 84.

We shall consider successively the two claims of error urged by appellants.

First. Suits by and between corporations as citizens of different states have always presented troublesome problems of jurisdiction to the federal courts. For half a century after the passage of the first judiciary act, a corporation was allowed to sue or be sued in the circuit courts [fol. 88] only when all its members were citizens of the state which created it. Bank of United States v. Deveaux, 5 Cranch 61. But in 1844, it was held in Louisville R. R. Co. v. Letson, 2 How. 497, that for the purposes of determining federal jurisdiction a corporation was to be deemed a person or an inhabitant, and thus a citizen, of the state in which it was incorporated. Although this conclusion has been assailed as unreal, it has been consistently followed ever since, and attempts at legislative change, even when made under distinguished sponsorship, have proven unsuccessful.[1] Hence on all questions of jurisdiction in-

[1] Among proposals to limit the jurisdiction of the federal courts before the Congress in 1932 was one drafted by the then Attorney General Mitchell and sponsored by President Hoover which would not have eliminated any of the language of Jud. Code, § 24 (1), 28 U. S. C. A. § 41 (1), defining the original jurisdiction of the federal courts over suits between citizens of different states, but would have

volving diversity of citizenship, this appellee is conclusively determined to be a citizen of the State of Delaware by reason of its incorporation there.

It was perhaps not logically necessary that a like conclusion should be reached as to the residence of a corporation under the requirements as to venue; but such a conclusion was a natural one, in the light of the language of the Letson case and the policy involved. And it was the meaning ascribed to the residence requirement in Ex parte Schollenberger, 96 U. S. 369, 377, decided in 1877. Yet the question was not then important, for the venue statute, from the time of the original judiciary act, had provided that a defendant might be sued in a district in which he should be "found" at the time of serving the writ. (Act of Sept. 24, 1789, c. 20, § 11, 1 Stat. 79; Act of Mar. 3, 1875, c. 137, 18 Stat. 470.) Hence the court held that a corpora- [fol. 89] tion doing business within the state was to be found within it for the purposes of venue. Ex parte Schollenberger, supra. This part of the statute was, however, eliminated in 1887. (Act of Mar. 3, 1887, c. 373, § 1, 24 Stat. 552, as corrected by the Act of Aug. 13, 1888, c. 866, § 1, 25 Stat. 433.) From that time the statute has required residence in (or being an inhabitant of) the district to support the action. Jud. Code, § 51, supra. After the change in the statute it has been held uniformly by the Supreme Court and generally by the lower federal courts that residence is limited to the state of incorporation of the corporation and is not satisfied by the doing of business within the state. Shaw v. Quincy Mining Co., 145 U. S. 444; Southern Pacific Co. v. Denton, 146 U. S. 202; In re Keasbey and Mattison Co., 160 U. S. 221; Macon Grocery Co. v. Atlantic Coast Line R. R. Co., 215 U. S. 501;

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added to it a provision that a foreign corporation carrying on business in a state other than the one wherein it was organized should be treated as a citizen of the former state for suits by residents thereof arising out of the business carried on in such state. S. B. 937, 72d Cong., 1st Sess. (1932). It failed of passage. See Comment by members of the faculty of the University of Chicago Law School, Limiting Jurisdiction of Federal Courts, 31 Mich. L. Rev. 59 (1932), and Clark, Diversity of Citizenship Jurisdiction of the Federal Courts, 19 A. B. A. J. 499 (1933), for discussion of the proposal and for other relevant citations.

Seaboard Rice Milling Co. v. Chicago, R. I. & P. Ry. Co., 270 U. S. 363; Yanuszauckas v. Mallory S. S. Co., 2 Cir., 232 F. 132; McLean v. State of Mississippi, 96 F. 2d 741, cert. den. — U. S. — , 59 S. Ct. 84, 83 L. Ed. 20; Central West Public Service Co. v. Craig, 8 Cir., 70 F. 2d 427; De Dood v. Pullman Co., 2 Cir., 57 F. 2d 171, aff'g 53 F. 2d 95, E. D. N. Y.

Among the several decisions of district courts to the same effect may be cited that of A. N. Hand, D. J., in Beech-Nut Packing Co. v. P. Lorillard Co., 287 F. 271, S. D. N. Y., in 1921, relied on by the court below in the present case. The only exception in recent years to this uniform current of decision seems to be Dodge Mfg. Co. v. Patten, 7 Cir., 60 F. 2d 676, aff'g 23 F. 2d 852, D. C. Ind., which was based upon the decision of Mr. Justice Harlan on circuit in U. S. v. Southern Pacific R. R. Co., 49 F. 297, N. D. Cal. The court, however, failed to note the later contrary decisions of the Supreme Court, in several of which Mr. Justice Harlan dissented. Cf. Shaw v. Quincy Mining Co. and Macon Grocery Co. v. Atlantic Coast Line R. R. Co., supra.[2]

[fol. 90] Appellants, however, criticize the policy followed in these cases as applied to the modern private corporation doing business in many different places and suggest ingenious distinctions to lessen their force as precedents. But so far as the policy is concerned, Congress has shown itself as yet distinctly uninterested in a change in the direction urged by appellants. Indeed, so long as the citizenship of a corporation for jurisdictional purposes is determined by the state of its incorporation, there would seem no good reason for a different view of the venue requirements. The limitation on suits against a corporation implicit in the rule as to jurisdiction would be of comparatively little effect if all plaintiffs who lived outside the state of incorporation could sue the corporation at will wherever it carried on business.

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[2] The Patten case has recently been questioned in its own circuit for this reason. Hamilton Watch Co. v. The George W. Borg Co., N. D. Ill. E. D., Mar. 6, 1939, Wilkerson, D. J. (Dept. of Justice, Decisions on Federal Rules of Civil Procedure, Bull. No. 23, Apr. 3, 1939.)

The suggested grounds for distinguishing the cases find no support in the precedents themselves or in the reasons behind them. Thus it is asserted that in no one of the decisions of the Supreme Court was there involved a corporation which not only does business and has its headquarters within the state, but also maintains there a designated office and agent to accept process. The cases discussed below in connection with appellants' second claim show that this combination of circumstances is not enough to show even waiver of the venue defense, and therefore certainly not residence in the district. Moreover, the reasons for, and historical development of, the rule show that the claimed distinction would be simply a direct repudiation of the rule itself. See especially Shaw v. Quincy Mining Co. and In re Keasbey and Mattison Co., supra. The latter case demonstrates, too, that no sound distinction is possible based on the fact that some of the cases, such as those for patent or copyright infringement, can be brought only in the federal courts, while actions such as the present one can be brought in either the state or the federal courts. Indeed, the stricter rule might be justified, if at all, in cases such as the present where a more extensive [fol. 91] choice of forum is possible. But no such distinction appears in the statute or is suggested by the cases.

Some support is claimed from decisions of the New York courts that a foreign corporation having qualified to do business within the state is present within the state, so as not to prevent the running of the statute of limitations in its favor. Cf. Comey v. United Surety Co., 217 N. Y. 268, 273-274. Such a result is reasonable, since the corporation is continuously subject to suit in the state court. It is not useful in determining the entirely different problems of federal jurisdiction. Erie Railroad v. Tompkins, 304 U. S. 64, does not make such cases binding authorities on the present issue; whatever else that case may do, it certainly does not throw the determination of federal jurisdiction into the state courts.

Second. Appellants' other claim is based upon the facts, admitted on the record, that appellee qualified to do business within the State of New York in 1918 and, as required by the law then in force, designated an agent to accept

process.[3] Such agent, who is located in the Southern District of New York, is still acting under such designation. But the question whether such designation constitutes a waiver of the venue defense seems also well settled, contrary to the appellants' contention. In the case of Southern Pacific Co. v. Denton, 146 U. S. 202, decided in 1892, there is a clear statement of the court that the supposed agreement of the corporation went no further than a stipulation that process might be served upon its officers or agents, and that, while this might subject the corporation after proper service to the jurisdiction of a federal court so long as the federal statutes allowed it to be sued in [fol. 92] the district in which it was *found*, such an agreement could not, since Congress had made citizenship of the state, with residence in the district, the sole test of jurisdiction in this class of cases, "estop the corporation to set up non-compliance with that test" when sued in a federal court.

The appellants attempt to distinguish this case on several grounds going to show that this statement was dictum only, unnecessary to the decision. It was, however, a direct statement on the point in question and has been accepted as authoritative. It is true that in the Denton case the Texas statue authorizing qualification of a foreign corporation to do business in the state was held unconstitutional, since it required as a condition of such qualification that the corporation relinquish its right of removal of cases to the federal courts. But the holding that there was no waiver was made an alternative ground of decision. It is also claimed that the act had already been repealed, and that the Texas records do not disclose any actual designation of the defendant corporation. But the facts stated by the court show that the repeal came after the action was brought, and the decision was rendered on the basis, admitted on the record, that the corporation had complied with the statute. Cases following and applying the Denton case include McClean v.

[3] N. Y. Gen. Corp. Law, §§ 15, 16, Cons. Laws of 1909, c. 22. These statutes were later changed to provide for the designation of the secretary of state as the agent of the corporation upon whom process might be served, but all prior designations of particular agents were continued. N. Y. Gen. Corp. Law, §§ 210, 213.

State of Mississippi, 5 Cir., 96 F. 2d 741, cert. den—U. S.—59 S. Ct. 84, 83 L. Ed. 20; Heine Chimney Co. v. Rust Engineering Co., 7 Cir., 12 F. 2d 596; and numerous district court decisions. (Beech-Nut Packing Co. v. P. Lorillard Co., supra; Gray v. Reliance Life Ins. Co., 24 F. Supp. 144, W. D. La.; Standard Stoker Co. v. Lower, 46 F. 2d 678, Md.; Thomas Kerfoot & Co. v. United Drug Co., 38 F. 2d. 671, Del.; Jones v. Consolidated Wagon & Machine Co., 31 F. 2d 383, S. D. Idaho, appeal dismissed 280 U. S. 519; Hagstoz v. Mutual Life Ins. Co. of New York, 179 F. 569, E. D. Pa.; Platt v. Massachusetts Real-Estate Co., 103 F. 705, Mass.)

The decision by the Fifth Circuit Court of Appeals in McLean v. State of Mississippi, supra, contains a careful analy- [fol. 93] sis of the authorities and considers and disposes of the various objections offered against the ruling in the Denton case. Application for writ of certiorari in the McLean case was denied by the Supreme Court on October 10, 1938, after the decision below in the pending action. 59 S. Ct. 84.

Decisions and opinions to the contrary seem to be limited to the ruling of the district court, found in 23 F. 2d 852 in the case of Patten v. Dodge Mfg. Corp., supra—since the circuit court of appeals affirmed solely on the point of residence to which its opinion is cited above (60 F. 2d 676)—and some early rulings of lower courts. Schainwald v. Davids, 69 F. 704, N. D. Cal.; and Consolidated Store Service Co. v. Lamson Consolidated Store-Service Co., 41 F. 833, Mass., the force of which is weakened by the decision of the same judge contra in Platt v. Massachusetts Real-Estate Co., supra.[4]

It is asserted, however, that the Denton case and the cases relying on it are not controlling here because they involved only a consent by the corporation through its designated agent to accept process, while the present consent is one to be sued within the state. And reliance is placed upon a recent case, decided by the Circuit Court of Appeals for the Tenth Circuit, Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 100 F. 2d 770.[5]

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[4] Cf. also statements in Bogue v. Chicago, B. & Q. R. Co., 193 F. 728, S. D. Iowa; U. S. v. Sheridan, 119 F. 236, W. D. Ky.; and O'Donnell v. Slade, 5 F. Supp. 265, M. D. Pa.

[5] Petition for certiorari filed March 15, 1939. Supreme Court Appellate Docket No. 750. 6 U. S. L. Week 979, 1011.

In this case the court, while recognizing the general rule referred to above, did hold that an Oklahoma statute required a consent not merely to accept process, but to be sued in the state courts (as indeed the trial court found, 100 F. 2d at pp. 773-774), and that this consent likewise operated in the federal courts to constitute a waiver of the venue de- [fol. 94] fense. Notwithstanding the authority of this court, we are not convinced of the soundness of this distinction. If state statutes of the form considered in the cases discussed above do not force a waiver of the federal venue privilege, it is difficult to see what is added by this further provision. It would mean, of course, that the addition of a few words to a state statute would demolish a privilege given by federal law. Moreover, as a practical matter, state legislation requiring consent to be sued as a condition of qualification is usually an unnecessary gesture, since state courts will have jurisdiction of such suits against foreign corporations as concern the state or its citizens, if service of process can be had on the corporation. The statute therefore need only provide for service of process. Indeed, the added provisions of the Oklahoma statute have another reasonable explanation, i. e., the necessity that suits against corporations should satisfy local requirements of venue, since the designated agent was to be found only at the State Capitol. Hence there was coupled with the requirement of the designation of an agent upon whom service of process might be made, the further statement that action might be brought in any county. Okl. Stat. (1931) § 130; cf. Okl. Const., Art. 9, § 43.

Whatever may be the force of the distinction, however, the court did recognize the general rule that a mere designation of an agent to accept process is not a waiver of the venue privilege. Appellants' attempted construction of the New York corporation laws as including a consent to be sued comparable to that found in the Oklahoma statute cannot be sustained. The applicable statutes in New York are clear in requiring merely the designation of an agent "upon whom all process in any action or proceedings against it may be served within this state."[6]

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[6] This is the wording of the present statute, N. Y. Gen. Corp. Law, § 210, under which the secretary of state is the agent to be designated; the language of the earlier statute was similar. See note 3, supra.

[fol. 95] It is true that another statute authorizes actions against foreign corporations under certain circumstances, including that "where a foreign corporation is doing business within the state." N. Y. Gen. Corp. Law, § 225. But this is but a general grant of jurisdiction applying to all actions within the defined classes, whether the corporation has properly qualified to do business or not and whether it is acting legally or illegally. Since, therefore, this general grant of jurisdiction operates independently of any designation of an agent to accept process, it cannot be construed to extend the consent which the corporation has made by affirmatively complying with the requirements of law as to doing business within the state.

Appellants also claim that the New York statute has been construed as one requiring the corporation's consent to be sued in the local courts, citing Smolik v. Phila. & Reading C. & I. Co., 222 F. 148, S. D. N. Y.; and Bagdon v. Phila. & Reading R. & I. Co., 217 N. Y. 432. These cases are relied on as showing the corporation's consent, by its designation of an agent to accept process, to being sued on all transitory actions, whereas without such designation, suit would lie only in the jurisdiction where it had done the business out of which the cause of action arose. But this concerns the jurisdiction of the court over the case, not the personal privilege as to the place of the suit accorded the defendant by Jud. Code, § 51. Jurisdiction over the causes was obtained, since personal service could be had on the defendants through their agents designated to accept process. Beech-Nut Packing Co. v. P. Lorillard Co., supra. So here, had plaintiffs been residents of the Southern District of New York, so that the venue was properly laid, service of process upon the defendant would have been had by service upon its agent. The cases do not go beyond this or affect the requirement of venue.

We conclude, therefore, that under existing law appellee was entitled to claim its privilege not to be sued in the [fol. 96] Southern District of New York. When it did so,[7]

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[7] The cumbersome method of claiming the privilege resorted to here—special appearance and motion to set aside service of the subpoena and the Marshal's return of service of the subpoena—may now be superseded by a simple motion to dismiss, under Rule 12(b), Federal Rules of Civil Procedure.

there was no other course of action open to the court below but to dismiss the action as to it. There seems little hardship involved to the plaintiffs, for appellee can be sued in the appropriate federal districts, while the entire action as now conceived by the plaintiffs can be brought in the state courts. And if a change in policy is desirable, it must be sought from Congress. It follows that the order of dismissal as to appellee must be affirmed.

Affirmed.

[fol. 96½] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Neirbo Company et al., Appellants, v. Bethlehem Shipbuilding Corporation, Ltd., Appellee, and United Shipyards, Inc., et al., Defendants. (Copy.) Opinion. Clark, Circuit Judge.

[fol. 97] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of April, one thousand nine hundred and thirty-nine.

Present: Hon. Learned Hand, Hon. Charles E. Clark, Circuit Judges.

NEIRBO COMPANY et al., Plaintiffs-Appellants,

vs.

BETHLEHEM SHIPBUILDING CORPORATION, LTD., Defendant-Appellee; UNITED SHIPYARDS, INC., et al., Defendants.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 98] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Neirbo Company et al., vs. Bethlehem Shipbuilding Corporation, Ltd. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 19, 1939. William Parkin, Clerk.

[fol. 99] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 98, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Neirbo Company, et al., Plaintiffs-Appellants, against Bethlehem Shipbuilding Corporation, Ltd., Defendant-Appellee, United Shipyards, Inc., et al., Defendants, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this twentieth day of April, in the year of our Lord one thousand nine hundred and thirty-nine, and of the Independence of the said United States the one hundred and sixty-third.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 29, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 750, Oklahoma Packing Company, et al. vs. Oklahoma Gas and Electric Company, et al.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 27 1939
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. [redacted] 38

NEIBRO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, DENIS F. O'BRIEN and EMMA BOURKE,
Petitioners,

against

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF

LAURENCE ARNOLD TANZER,
ROBERT P. WEIL,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No.

NEIBRO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, DENIS F. O'BRIEN and EMMA BOURKE,
Petitioners,

against

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

This is a petition for a writ of certiorari to the Second Circuit Court of Appeals to review its decision affirming the determination of the District Court for the Southern District of New York, setting aside service of process on Bethlehem Shipbuilding Corporation, Ltd. (hereinafter referred to as "Bethlehem") and dismissing this suit as against it.

Statement

Your petitioners, citizens of the State of New Jersey and residents of the District of New Jersey (R. 9), commenced this suit in the District Court of the United States

for the Southern District of New York against United Shipyards, Inc. and John E. Aldred, citizens of the State of New York and residents of the Southern District of New York (R. 9-11), the Chase National Bank, a national banking association having its principal office within the State of New York and the Southern District of New York (R. 10), and Joseph W. Powell, a citizen of the State of Massachusetts and a resident of the District of Massachusetts (R. 10), who has appeared generally herein. Your petitioners applied for an injunction to restrain United Shipyards, Inc., of which they are stockholders, from transferring substantially all its properties to Bethlehem (R. 1-2). A preliminary injunction was denied, and the transfer was consummated (R. 2). A supplemental bill (R. 9-46) was then filed by leave of the District Court (R. 6-8, 1-2), adding Bethlehem as a defendant and praying that Bethlehem be declared trustee for your petitioners of an interest in the property conveyed (R. 44), much of which is within the jurisdictional limits of the Southern District of New York (R. 16, 32, 35, 36, 43).

The declaration of a trust is sought by your petitioners on the basis of acts by Bethlehem in the Southern District of New York (R. 32-43, 55).

Bethlehem has its chief business office at #25 Broadway, New York City, within the Southern District of New York. In addition, that office in a factual sense is the corporate domicile of Bethlehem, since at that place and at no other place its Board of Directors meet to conduct its business, the chief executive officers of the company have their permanent offices, and the chief books and records of a general corporate and business nature are kept (R. 55).

In addition, Bethlehem has substantial property within the jurisdictional limits of the Southern District of New York in the form of drydocks in the waters of New York Harbour (R. 16, 32, 35, 36, 43).

Bethlehem is a corporation organized under the laws of Delaware (R. 64), but except technically, Bethlehem is not present in Delaware. Its office in Delaware is a nominal one, consisting of a listing with the Corporation Trust Company, and it has no plants or other property of a substantial and permanent nature in Delaware (R. 55).

Bethlehem has been qualified to do business in New York since 1918 (R. 56), its designated office in the State of New York being its headquarters at #25 Broadway, New York City, in the Southern District of New York (R. 81)..

Bethlehem's qualification and designation were effected under statutes which provided, and now provide,[1] that

(1) No corporation organized under the laws of another state shall do business in New York without being qualified.

(2) No such corporation shall be qualified to do business until it has designated an agent for service of process.

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[1]In 1918, when Bethlehem qualified and filed its designation, these provisions were contained respectively in N. Y. Gen. Corp. Law, §§ 15 and 16, and N. Y. Code of Civil Procedure, § 1780. As amplified and reenacted, they are now found in Gen. Corp. Law, §§ 210, 212, 218, 219, 223, 224, 225. Gen. Corp. Law, § 210 now provides that the designated agent shall be the New York Secretary of State, but § 213 continues the effectiveness of designations, like Bethlehem's, of a particular agent, filed prior to 1927. The relevant portions of former §§ 15 and 16 of Gen. Corp. Law and Code of Civil Procedure, § 1780, and present §§ 210, 213 and 225 of Gen. Corp. Law are printed in the appendix.

in all suits and proceedings against the corporation in New York.

(3) Suits may be maintained in the New York Courts by non-residents or by corporations organized under the laws of another state against foreign corporations where

(a) the cause of action arose in New York

or

(b) the defendant is doing business in New York.

The equity subpoena (R. 42) was served on Bethlehem within the Southern District of New York by delivering it personally to the designated agent (R. 77-79) at the designated office at #25 Broadway, New York City (R. 48).

Bethlehem appeared specially and moved to set aside service on it on the ground that the jurisdiction of the Court being based on diversity of citizenship, § 51 of the Judicial Code (U. S. Code, Tit. 28, § 112) conferred on it the privilege of objecting to the venue of the suit as having been laid neither in the District of Delaware, the district of which it is a resident, or the District of New Jersey, of which your petitioners are residents (R. 49-53).

The District Court granted Bethlehem's motion, setting aside the service of process on Bethlehem and dismissing the suit as against it (R. 4). The Circuit Court of Appeals affirmed.

The judgment is final because, in dismissing this suit as against Bethlehem, it finally disposes of your petitioners' cause of action as therein asserted for the declaration of a

trust in the property in Bethlehem's hands.[2] That cause of action was not asserted against any other defendant, and no other cause of action was asserted against Bethlehem.

Jurisdiction

The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Tit. 28, § 347).

The decree of the Circuit Court of Appeals was entered on April 19, 1939.

Questions Presented

1. Does a corporation organized under the laws of one state, by qualifying to do business in another state and designating an agent for the service of process pursuant to its statutes, consent to be sued in the local courts on causes of action over which such courts have jurisdiction under such statutes, and thereby waive the privilege conferred by § 51 of the Judicial Code against being sued in a district other than that of plaintiff's or defendant's residence, as to such causes of action, where maintainable in the local federal courts because of diversity of citizenship and the required amount in controversy?

2. Is a corporation incorporated under the laws of one state, in which it has no activities or property of a sub-

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[2] *Hill* v. *Chicago & Evanston Rd. Co.* (1891) 140 U. S. 52; *United States* v. *River Rouge Improvement Co.* (1926) 269 U. S. 411, 413-414; *Williams* v. *Morgan* (1884) 111 U. S. 684, 699.

stantial nature, a resident, within the meaning of § 51 of the Judicial Code, of a district in another state, within the jurisdictional limits of which district its main business headquarters, its registered office, its designated agent and a substantial part of its properties are located?

Reasons Relied On for Allowance of Writ

1. The decision below is in direct conflict with the decision of the Tenth Circuit Court of Appeals in *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.* (1938) 100 F. (2d) 770, 774-775, that qualification to do business in a state and designation of an agent for service of process operate, as to a cause of action which the statutes of the state authorize to be maintained in the forum, as a waiver of the privilege conferred by § 51 of the Judicial Code against being sued by a non-resident.

This Court granted certiorari to review the *Oklahoma Packing Co.* case April 17, 1939 (# 750).

2. The decision below on that question appears to be in conflict with the decisions of this Court holding that:

> (a) Designation of an agent for service of process in suits in the local courts, exacted by a state in consideration of permission to do local business in the state, results in a consent to be sued on all causes of action of which the state courts have jurisdiction, and where the local federal courts have concurrent jurisdiction, the designation oper-

ates as a consent to be sued on such causes of action in those courts as well.

Ex parte Schollenberger (1877) 96 U. S. 369, 375-378.

(b) Such consent to be sued is a voluntary contract assenting to the terms of the applicable state statutes as construed by the state courts.

Pennsylvania Fire Ins. Co. v. *Gold Issue Mining & Milling Co.* (1917) 243 U. S. 93, 95-96;

Mitchell Furniture Co. v. *Selden Breck Construction Co.* (1921) 257 U. S. 213, 215-216;

Louisville & Nashville Rd. Co. v. *Chatters* (1929) 279 U. S. 320, 329;

Morris & Co. v. *Skandinavia Ins. Co.* (1929) 279 U. S. 405, 408-409.

3. The Court below in holding that qualification and designation under the New York statute operates merely as a consent to service of process, not as a consent to be sued on all causes of action authorized by the New York statutes to be maintained in the local courts, has decided an important question of local law in conflict with the decision of the New York Court of Appeals in *Bagdon* v. *Philadelphia & Reading C. & I. Co.* (1916) 217 N. Y. 432, 436-437.

4. The decision below is in direct conflict with the decision of the Seventh Circuit Court of Appeals in *Dodge Manufacturing Co.* v. *Patten* (1932) 60 F. (2d) 676,

679-680, holding that a corporation factually present in a district in which it is qualified to do business and has a designated office, is a resident thereof within the meaning of § 51 of the Judicial Code, although incorporated in another state.

5. On these points, the Court below has decided important questions of federal law of general application which have not been, but should be, settled by this Court.

WHEREFORE it is respectfully submitted that the prayer of this petition should be granted.

Dated, New York, April 26, 1939.

NEIBRO COMPANY,
THE A. P. SMITH MANUFACTURING COMPANY,
DENIS F. O'BRIEN and
EMMA BOURKE,

Petitioners.

LAURENCE ARNOLD TANZER,
ROBERT P. WEIL,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION

A statement of the grounds on which the jurisdiction of this Court is invoked, and a statement of the case, are contained respectively at page 5 and pages 1-5 of the petition, *supra*.

Statute Involved

Judicial Code, § 51 so far as material provides as follows:

> "* * * no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Opinions Below

The opinion of the Circuit Court of Appeals by Clark, *C. J.* appears at pages 85-95 of the Record. It has not yet been printed in the reports. The memorandum decision of Caffey, *D. J.* appears at page 5 of the Record.

Argument

I

Bethlehem Has Waived the Venue Privilege.

1. § 51 of the Judicial Code does not limit the jurisdiction of the courts, but merely confers a personal privilege

on the defendant which he may assert or waive at his election.

Lee v. *Chesapeake & Ohio Railway Co.* (1922) 260 U. S. 653, 655,

and cases there collected.

2. In *Ex parte Schollenberger* (1877) 96 U. S. 369, this Court held that qualification and designation of an agent under the statutes of a state operated as a consent to be sued in the local courts on all causes of action within their jurisdiction, and was effective as to the local federal courts in cases within their concurrent jurisdiction.

The venue statute at that time[3] contained a provision, since repealed,[4] permitting a corporation to be sued where it was found, and the precise point there decided, that the corporation could be sued because it had consented to be found, is therefore not now applicable; but that circumstance does not affect the authority of the *Schollenberger* case as a determination of the underlying principle that qualification and designation is a consent to be sued in the local courts, equally operative in the local federal courts in cases within their concurrent jurisdiction.

3. The terms and extent of the consent to be sued depend upon the construction of the state statutes by the courts of the state.

Pennsylvania Fire Ins. Co. v. *Gold Issue Mining & Milling Co.* (1917) 243 U. S. 93, 95-96;

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[3]Act of Mar. 3, 1875, c. 137, § 1, 18 Stat. 470.
[4]Act of Mar. 3, 1887, c. 373, § 1, 24 Stat. 552.

Mitchell Furniture Co. v. *Selden Breck Construction Co.* (1921) 257 U. S. 213, 215-216;

Louisville & Nashville Rd. Co. v. *Chatters* (1929) 279 U. S. 320, 329;

Morris & Co. v. *Skandinavia Insurance Co.* (1929) 279 U. S. 405, 408-409.

4. The New York Court of Appeals has determined that qualification and designation under the New York statutes is a consent to be sued on all causes of action which those statutes permit to be maintained against foreign corporations in the local courts.

Bagdon v. *Philadelphia & Reading C. & I. Co.* (1917) 217 N. Y. 432, 436-437.

5. The cause of action here asserted against Bethlehem is one which, under the New York statutes in force now and at all times since Bethlehem's qualification and designation, could be maintained against it in the local courts (statutes cited in petition, *supra*, pp. 3-4).

6. It follows that Bethlehem has consented to be sued in the local courts, state or federal, on this cause of action, and has waived the personal privilege conferred by § 51 of the Judicial Code against being sued thereon in a district in which neither party resides.

7. *Southern Pacific Co.* v. *Denton* (1892) 146 U. S. 202 does not hold the contrary of the foregoing propositions:

(a) The point actually decided in that case was that a state statute requiring a foreign corporation

as a condition of qualification to waive the right of removal to a federal court was unconstitutional. The observation in the opinion with respect to the effect of a supposed designation of an agent in Texas related to a statute which *had been declared unconstitutional by the Supreme Court of Texas* after commencement of the Denton suit, but *two years before that case reached this Court* (*Texas Land & Mortgage Co.* v. *Worsham* (1890) 76 Tex. 556, 13 S. W. 384).

(b) This Court stated the case to be governed by the rule regarding the extent to which a corporation may be sued locally which *has not* qualified and designated an agent for service of process (*Shaw* v. *Quincy Mining Co.* (1892) 145 U. S. 444), thus assuming that no greater liability to suit in the forum arises from qualification and designation, a point since decided to the contrary in

Pennsylvania Fire Ins. Co. v. *Gold Issue Mining & Milling Co., supra.*

II

For Purposes of Venue Bethlehem Should Be Treated as a Resident of the Southern District of New York.

This Court has held that for purposes of venue a corporation is not a resident of a district outside of its state of incorporation merely by reason of doing business there (*Shaw* v. *Quincy Mining Co.* (1892) 145 U. S. 444, 453; *In re Keasbey & Mattison Co.* (1895) 160 U. S. 221, 229; *Macon Grocery Co.* v. *Atlantic Coast Line* (1909) 215

U. S. 501, 508; *Seaboard Rice Milling Co.* v. *Chicago, R. I. & Pac. Ry. Co.* (1926) 270 U. S. 363, 366). This Court has never, unless in the dictum in the *Denton* case, *supra*, passed upon the effect of qualification and the designation of a local office and agent in a district containing its chief business and corporate headquarters, especially where, in the state of incorporation, the corporation has no real activities or property.

Since 1892, when the *Denton* case was decided, corporate development has presented the federal courts with the new problem of corporations such as Bethlehem, which arbitrarily pick a state for incorporation because affording maximum management control and minimum taxation and then proceed to set up business headquarters and transact their affairs at another place where their business actually is. Solely by legal tradition, they are there "foreign" corporations. They habitually sue in the federal courts, and remove suits against them, but when originally sued there, they use the old rule to harass the plaintiff and *prevent* suit against them *at their business headquarters.*

In determining whether suit in the courts of a state other than that in which it is incorporated would constitute a burden on interstate commerce this Court has referred to corporations as residents of "foreign" states in which they have offices and carry on their corporate functions. Thus in *Missouri ex rel St. Louis, Brownsville & Mexico Ry.* v. *Taylor* (1924) 266 U. S. 200, Mr. Justice Brandeis, writing for this Court, said in referring to a corporation organized under the laws of Delaware (p. 207):

> "* * * the plaintiff consignee is a resident of Missouri—that is, has a usual place of business within the state."

And in *International Milling Co.* v. *Columbia Co.* (1936) 292 U. S. 511, this Court, speaking through Mr. Justice Cardozo, while recognizing the rule of venue declared in the *Shaw* and *Seaboard* cases said (p. 519):

> "* * * the petitioner, though a Delaware corporation is suing in the state of its business activities. For many purposes, its domicile in law is in the state of its creation (*Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *Seaboard Rice Milling Co.* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 363), but it is living its life elsewhere. *In a very real and practical sense, it is a resident of the forum,* like the plaintiff in the *Taylor* case (266 U. S. 200, 207), who was *domiciled in one state and resided in another.*"[5]

Conclusion

A writ of certiorari should be granted as prayed in the petition.

Respectfully submitted,

LAURENCE ARNOLD TANZER,
ROBERT P. WEIL,
Counsel for Petitioners.

[5]Emphasis added.

Appendix

Former Provisions

General Corporation Law

§ 15. "No foreign stock corporation * * * shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, * * *"

§ 16. "Before granting such certificate the secretary of state shall require every such foreign corporation to file in his office * * * a statement under its corporate seal, * * * designating, in the manner prescribed in the Code of Civil Procedure, a person on whom process against the corporation may be served within the state. * * *"

Code of Civil Procedure

§ 1780. **When foreign corporation may be sued.** * * * An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract, made within the State, or relating to property situated within the State, at the time of the making thereof.

2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.

3. Where the cause of action arose within the State, except where the object of the action is to effect the title to real property situated without the State.

4. Where a foreign corporation is doing business within this state.

Existing Provisions

General Corporation Law

§ 210. Authorization of foreign corporations, other than moneyed corporations, to do business within the state. A foreign corporation, other than a moneyed corporation, shall not do business in this state without having first obtained from the secretary of state a certificate of authority. To obtain such certificate, the corporation shall comply with the following conditions:

1. It shall present to the secretary of state a statement and designation in its corporate name, signed and acknowledged by its president, or a vice-president, or its secretary, treasurer, managing director or attorney in fact, which shall set forth the state or country of its incorporation, the place where its office within this state is to be located, the business which it proposes to do within this state, and a designation of the secretary of state as its agent upon whom all process in any action or proceedings against it may be served within this state.

* * * * * *

§ 213. Existing authority and designation continued. Every corporation which, at the time this section takes effect, has authority to do business in the state pursuant to a certificate heretofore granted by the secretary of state, shall continue to have such authority. The designation heretofore made by any such corporation of a person upon whom all process against it may be served within the state shall continue in full force and effect until the filing in the department of state of a written revocation by the corporation of such designation, or until the death, resignation or removal from the state of the person so designated, * * *.

§ 225. **Action against foreign corporation by another foreign corporation or non-resident.** An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract made within the state, or relating to property situated within the state, at the time of the making thereof.

2. Where it is brought to recover real property situated within the state, or a chattel, which is replevined within the state.

3. Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state.

4. Where a foreign corporation is doing business within the state.

* * * * * *

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 38

NEIRBO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, ET AL.,

Petitioners,

vs.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF

LAURENCE ARNOLD TANZER,
ROBERT P. WEIL,
Counsel for Petitioners.

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PETITIONERS' BRIEF

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported in 103 F. (2d) 765. The opinion of the District Court is not officially reported. It appears at page 5 of the record.

JURISDICTION

The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347).

STATUTE INVOLVED

Judicial Code, § 51 (28 U. S. C. A. 112) so far as material provides as follows:

> "• • • no civil suit shall be brought in any district court against any person by any original process or

proceeding in any other district than that whereof he is an inhabitant, but where jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

STATEMENT OF THE CASE

Petitioners, citizens of the State of New Jersey and residents of the District of New Jersey (R. 9), commenced this suit in the District Court of the United States for the Southern District of New York against United Shipyards, Inc. and John E. Aldred, citizens of the State of New York and residents of the Southern District of New York (R. 9-11), the Chase National Bank, a national banking association having its principal office within the State of New York and the Southern District of New York (R. 10), and Joseph W. Powell, a citizen of the State of Massachusetts and a resident of the District of Massachusetts (R. 10), who has appeared generally herein. Petitioners applied for an injunction to restrain United Shipyards, Inc., of which they are stockholders, from transferring substantially all its properties to respondent (R. 1-2). A preliminary injunction was denied, and the transfer was consummated (R. 2). A supplemental bill (R. 9-46) was then filed by leave of the District Court (R. 6-8), adding respondent as a defendant and praying that respondent be declared trustee for petitioners of an interest in the property conveyed (R. 44), much of which is within the jurisdictional limits of the Southern District of New York (R. 16, 32, 35, 36, 43; Judicial Code, § 97, 28 U. S. C. A. 178; see *Gefle Manufacktur Aktiebolag* v. *U. S.* (S. D. N. Y., 1923) 291 Fed. 927).

The declaration of a trust is sought by petitioners on the basis of acts by respondent in the Southern District of New York (R. 32-43, 55).

Respondent has its chief business office at No. 25 Broadway, New York City, within the Southern District of New York. In addition, that office in a factual sense is the corporate domicile of respondent, since at that place and at no other place its Board of Directors meet to conduct its business, the chief executive officers of the company have their permanent offices, and the chief books and records of a general corporate and business nature are kept (R. 55).

Respondent is a corporation organized under the laws of Delaware (R. 64), but except technically, it is not present in Delaware. Its office in Delaware is a nominal one, consisting of a listing with the Corporation Trust Company, and it has no plants or other property of a substantial and permanent nature in Delaware (R. 55).

Respondent's certificate of incorporation expressly authorizes it to conduct its business and exercise its powers (R. 68) and to hold its stockholders' meetings and keep its books (R. 72) outside of Delaware, as is permitted by the statutes of that state.[1]

Respondent has been qualified to do business in New York since 1918 (R. 56), its designated office in the State of New York being its headquarters at No. 25 Broadway, New York City, in the Southern District of New York (R. 81).

Respondent's qualification and designation were effected under statutes which provided, and now provide[2] that suits

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[1] § 32, Del. Corp. Law, printed in appendix; *Lippman* v. *Kehoe Stenograph Co.* (1915) 11 Del. Ch. 80, 91-92; id. 190, 202; affirmed (1918) id. 412, 424; 95 Atl. 895, 900; 98 Atl. 943, 948; 102 Atl. 988.

[2] N. Y. Code of Civil Procedure, § 1780, last part; slightly amplified in a particular not relevant here and reenacted as § 47, Gen. Corp. Law by L. 1920, c. 916; § 1; renumbered Gen. Corp. Law § 225, by L. 1929, c. 650, § 1. § 225 is printed in the appendix.

may be maintained in the New York Courts by non-residents or by corporations organized under the laws of another state against foreign corporations where, as here,

(a) the cause of action arose in New York or where, as here also,

(b) the defendant is doing business in New York.

The equity subpoena (R. 42) was served on respondent within the Southern District of New York by delivering it personally to the designated agent (R. 77-79) at the designated office at No. 25 Broadway, New York City (R. 48).

QUESTIONS PRESENTED

1. Does a corporation organized under the laws of one state, by qualifying to do business in another state and designating an agent for the service of process pursuant to its statutes, consent to be sued in the local courts on causes of action over which such courts have jurisdiction under such statutes, and thereby waive the privilege conferred by § 51 of the Judicial Code against being sued in a district other than that of plaintiff's or defendant's residence, as to such causes of action, where maintainable in the local federal courts because of diversity of citizenship and the required amount in controversy?

2. Is a corporation incorporated under the laws of one state, in which it has no activities or property of a substantial nature, a resident, within the meaning of § 51 of the Judicial Code, of a district in another state, within the jurisdictional limits of which district its main business headquarters, its registered office, its designated agent and a substantial part of its properties are located?

SUMMARY OF ARGUMENT

I

Respondent has waived the venue defense in this case, since

The venue provision is a restriction limiting the power of each of the district courts to compel defendants to appear before it, and nothing else.

Respondent filed the designation here in question in compliance with a requirement by New York that it agree to appear before the courts on notice to the designee.

That designation was a consent to be sued in any court in the state, and is equally effective in the local federal courts having jurisdiction as federal courts.

II

Respondent is an inhabitant of the Southern District of New York for venue purposes, even though treated as a citizen of Delaware for purpose of jurisdiction, since

"Citizen" in the jurisdiction clause and "inhabitant" in the venue clause of the Judicial Code are not synonymous. Congress deliberately used different words to convey different meanings.

A corporation incorporated on paper in one state, where it does no business, is an inhabitant of another state, where it has its business headquarters, where its directors meet, its chief executives have their offices, and where it is permitted to do business by the laws of both states.

This proposition has never been directly passed on by this Court. All that this Court has actually held is that for venue purposes a corporation incorporated in one state, where it transacts business, does not become an inhabitant of another state by doing some business there.

The rule contended for by petitioners will require a corporation to answer suit in the federal courts in the district where it can most conveniently defend or where, if doing business, it can be most conveniently sued by the plaintiff. The venue statute will thus be made effective as to corporations in the manner explicitly provided by Congress with respect to natural persons, and a corporation will not be permitted, as has respondent here, to avoid suit in the district where it does most of its business, and to compel those whose property has been affected by the doing of that business to seek it in a distant district chosen by it for paper incorporation.

ARGUMENT

I

Bethlehem having established in the Southern District of New York its main business headquarters, and under the New York General Corporation Law having applied for and received authority to do business in New York, and as a condition of such permission having designated an agent for service of process, has waived the right to assert, under § 51 of the Judicial Code, that it is not an inhabitant of that district and therefore cannot be sued there by petitioners.

A. The venue provision is a restriction limiting the Court's power to compel defendants to appear before it, and nothing else.

Unlike the common law venue restriction requiring an action for the primary purpose of affecting title to real estate to be brought in the district where the land is located,[3] or the common law venue restriction which required personal actions to be brought where the cause of action arose,[4] or venue restrictions in a state like New York having a court of general jurisdiction with branches sitting for trial in many different localities of the state, requiring certain kinds of actions to be tried in certain of the localities,[5] the general venue restriction applicable to the circuit courts was a restriction having to do only with the power of the courts to

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[3] *Massie* v. *Watts* (U. S. 1810) 6 Cranch 148, 158.
[4] Chitty's Pleading, 1809 ed. vol. 1, p. 282.
[5] N. Y. Civil Practice Act, §§ 182-189.

require defendants to appear before them. The original Judiciary Act divided the country into districts, most often coextensive with the various separate, sovereign states, and established a circuit court for each such district.[6] After establishing the districts and the courts, Congress next conferred on the circuit courts generally, jurisdiction over the subject-matter of various classes of suits. Next, in contradistinction to this broad grant, the local jurisdiction of the several courts over the persons of defendants was limited to those within their respective districts,[7] as was the jurisdiction of the state courts limited to persons within state boundaries. The language[8] is as follows:

> "the circuit courts shall have original cognizance, concurrent with the courts of several States, of *all*[9] suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and * * * the suit is between a citizen of the State where the suit is brought, and a citizen of another State. * * * *But* no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against

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[6] § 2, 1 Stat. 73.

[7] See opinion of Mr. Justice Story on circuit in Massachusetts in *Picquet* v. *Swan* (1828) 5 Mason 35, 40-47, where the interpretation to be given the venue provision was considered at length. The rationale of Mr. Justice Story was expressly approved and adopted by the Court in *Toland* v. *Sprague* (1838) 12 Pet. 300, 330-331. These cases are discussed in notes 39-41 *infra*, pp. 35-38.

[8] § 11, 1 Stat. 78.

[9] All emphasis in quotations added unless otherwise noted.

> an inhabitant of the United States, by an original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, * * *."

Thus the provision was a limitation of the jurisdiction over defendants to inhabitants of the district, who might owe obedience to local laws, and to persons found within the district for service of process. As such, it was recognized as conferring merely a personal privilege on the defendant with respect to the effectiveness of the means of bringing him before the court, which he might waive if he chose.

> *Pollard* v. *Dwight* (1808) 4 Cranch 421, 428-429;
> *Gracie* v. *Palmer* (1823) 8 Wheat. 699;
> *Toland* v. *Sprague* (1838) 12 Pet. 300, 330-331.

The amendment of 1887 [10] limited the jurisdiction over non-resident defendants found within the district to diversity-of-citizenship cases commenced by residents, but left unchanged the jurisdiction over inhabitant defendants, and with a brief interruption [11] this Court has accordingly continued to regard venue as a mere restriction on the scope within which process would be effective to bring defendants before the court. In *Interior Construction & Imp. Co.* v. *Gibney* (1895) 160 U. S. 217, 219 this Court said:

> "the provision as to the particular district in which the action shall be brought does not touch the general

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[10] March 3, 1887, c. 373, § 1, 24 Stat. 552, corrected Aug. 13, 1888, c. 866, § 1, 25 Stat. 433. The applicable portion is quoted *supra*, pp. 1-2.

[11] See *Ex parte Wisner* (1906) 203 U. S. 449; disapproved in *Ex parte Moore* (1908) 209 U. S. 490, 507 and expressly overruled in *Lee* v. *Chesapeake & Ohio Ry. Co.* (1923) 260 U. S. 653, 660.

> jurisdiction of the court over such a cause between such parties, but affects only *the proceedings taken to bring the defendant within such jurisdiction*, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; • • •"

Speaking of the venue defense in *Macon Grocery Co.* v. *Atlantic Coast Line* (1910) 215 U. S. 501, 508 this Court said:

> "as there was no waiver of the exemption from being sued in the court below, that court was without jurisdiction of *the persons* of the defendants."

This Court said in *Camp* v. *Gress* (1919) 250 U. S. 308, 311:

> "The objection of John M. Camp is not to the jurisdiction of a Federal court, but to the jurisdiction *over him* of the court of the particular district; that is, the objection is to the venue. He asserts the personal privilege not to be sued in a district other that that of his residence, since the action is not brought in the district of the plaintiff's residence."

In *General Investment Co.* v. *Lake Shore & M. S. R. Co.* (1922) 260 U. S. 261, 273 again referring to an objection to venue, this Court said:

> "And the inability of the court to proceed with the cause in the presence of such an objection would not have resulted from any want of power to entertain and determine such a suit between such parties, if they were before it, but only because the company *declined to yield the necessary jurisdiction of its person.*"

B. Respondent's designation was filed in compliance with a requirement by New York that a foreign corporation desiring authority to do business in the state agree to appear before the courts on notice to the designee.

The statute under which the designation was filed was Chapter 687 of the Laws of 1892, the pertinent parts of which are as follows (pp. 1805-1806):[12]

> "§ 15. Certificate of Authority of a Foreign Corporation.—No foreign stock corporation other than a monied corporation, shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business, or, if more than one kind of business, by two or more corporations so incorporated for such kinds of business respectively. * * * No foreign stock corporation doing business in this state without such certificate shall maintain any action in this state upon any contract made by it in this state until it shall have procured such certificate."

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[12] These sections were repealed by L. 1923, c. 787, § 2 (p. 1421), § 1 of which re-enacted them (pp. 1412-1414) in substantially similar form as §§ 110, 111, Stock Corp. Law. By L. 1927, c. 425, § 2, §§ 110, 111, Stock Corp. Law were repealed and by § 1 the provisions were amplified to their present form and re-enacted as §§ 15, 16a, 16b, 16f, 16g and 16h Gen. Corp. Law, and by L. 1929, c. 650, renumbered as presently designated, Gen. Corp. Law §§ 210, 212, 213, 217, 218 and 219, respectively. §§ 210, 213 and 218 are printed in the appendix.

"§ 16. Proof to be filed before granting certificate.—Before granting such certificate the secretary of state shall require every such foreign corporation to file in his office a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal, particularly setting forth the business or objects of the corporation which it is engaged in carrying on, or which it purposes to carry on, within the state, and a place within the state which is to be its principal place of business, and designating, in the manner prescribed in the Code of Civil Procedure, a person upon whom process against the corporation may be served within the state."

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"If the person so designated dies, or removes from the place where the corporation has its principal place of business within the state, and the corporation does not within thirty days after such death or removal, designate in like manner another person upon whom process against it may be served within the state, the secretary of state may revoke the authority of the corporation to do business within the state, and process against the corporation in an action upon any liability incurred within this state before such revocation may, after such death or removal and before another designation is made, be served upon the secretary of state. * * * the secretary of state shall forthwith mail a copy of such notice to such corporation, if its address or the address of any officer thereof is known to him."

These sections were adopted in order to remedy an actual or feared defect in the jurisdiction of the courts over foreign corporations doing business in the state, and to require corporations desiring authority to do such business to directly submit themselves to such jurisdiction. In the absence of statute, the New York courts, while finding no difficulty in adjudicating against foreign corporations which

came before them voluntarily[13] disclaimed all power to compel foreign corporations to appear before them.[14] Provisions for attaching the property of foreign corporations,[15] and later for making personal service of a summons and complaint on their officers[16] were adopted, resulting generally in continued refusal by the courts to admit they had any power to compel foreign corporations to submit to jurisdiction *in personam*.[17] Statutes requiring foreign corporations doing business in the state to designate process agents were adopted, first obligatory only on foreign insurance companies[18] and later on all foreign corporations.[19] On two earlier occasions, the Court of Appeals, relying on the geographical theory of corporations as expounded by

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[13] *McCormick* v. *Penn. Cent. Rd. Co.* (1872) 49 N. Y. 303.

[14] *M'Queen* v. *Middletown M. Co.* (1819) 16 Johns. 5, 6.

[15] N. Y. Revised Stats. of 1829, Part III, c. VIII, Tit. IV, Art. I, §§ 15-30, amended by L. 1840, c. 354, L. 1842, c. 197, L. 1849, c. 107.

[16] L. 1851, c. 479, L. 1859, c. 428, § 1.

[17] *Hulbert* v. *Hope Mut. Ins. Co.* (1850) 4 How. Pr. 274, 276; *Brewster* v. *Mich. Cent. R. R. Co.* (1850) 5 How. Pr. 183, 187; *Bates* v. *New Orleans, Jackson & Great Northern Rd. Co.* (1856) 13 How. Pr. 516, 519-520; *Whitehead* v. *Buffalo & Lake Huron Ry. Co.* (1859) 18 How. Pr. 218, 222-223; *Howell* v. *Chicago & North Western Ry. Co.* (1868) 51 Barb. 378, 383; *Ogdensburgh &c R. R. Co.* v. *Vermont &c R. R. Co.* (1875) 6 Thom. & Cook 488, 491; aff'd on another ground (1875) 4 Hun 712. Dicta to the contrary may be found in *Bank of Commerce* v. *Rutland & Washington Rd. Co.* (1854) 10 How. Pr. 1, 5; *McDonough* v. *Phelps* (1856) 15 How. Pr. 372, 376-377; *Cumberland Coal & Iron Co.* v. *Hoffman Steam Coal Co.* (1859) 30 Barb. 159, 163-164.

[18] L. 1853, c. 463, §§ 14, 15; c. 466, § 23.

[19] L. 1855, c. 279.

this Court in *Bank of Augusta* v. *Earle* (1839) 13 Pet. 519, 588, held that a foreign corporation which did business in New York did not thereby migrate to New York and obtain a residence there.[20] In *Gibbs* v. *Queen Ins. Co.* (1875) 63 N. Y. 114, that Court expressed its views regarding the power of the New York courts to compel foreign corporations doing business in the state to appear before them, and regarding the effect of the designation of a process agent. The case came up on appeal from an order denying the motion of a foreign insurance company to set aside service of process on its designated agent, on the ground that the courts of New York could exercise no jurisdiction *in personam* against any foreign corporation unless it should voluntarily appear, and that service of the summons would be effective only in a case where, and to the extent that, jurisdiction was obtained by attachment. First finding that the Legislature had finally shown an intention to provide for suits *in personam* against foreign corporations, the Court next held that where such a suit was commenced by service on a designated agent, the result was an effective judgment *in personam*. Drawing heavily for analogy on the English cases regarding jurisdiction *in personam* over absent defendants through service on their local agents, the Court held that the designation of a process agent was a consent that the New York courts after notice to the agent could exercise jurisdiction over the defendant, which the Court regarded as absent from the state. The Court said (pp. 128-129):

> "And now I am prepared to ask, would it not be sufficient to confer jurisdiction upon the Supreme

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[20] *Merrick* v. *Van Santvoord* (1866) 34 N. Y. 208, 218-219; *Stevens* v. *Phoenix Ins. Co.* (1869) 41 N. Y. 149, 152.

Court over this defendant, in this case, that the defendant had filed, in some proper place in the jurisdiction, an appointment of an agent, specifying that he was authorized to receive for it the very process issued in this case, and that thereby a suit therein might be commenced against it, and that the Supreme Court had ordered such service to be made, and that such service had been made in accordance therewith? Is it not much more effectual to that end, when the legislature of the State has enacted that the defendant, as a prerequisite to doing business in this State, shall designate an attorney or an agent therein upon whom process in any suit to be commenced against it may be served, and that it has designated a person as such agent, and that service of process against the defendant has been made upon him? *Is not the enactment of the statute by the legislature, a proffer to the defendant of the power to do business in this State, if it will subject itself to the jurisdiction of our courts, and is not the acceptance of that proffer by the defendant a submission to that jurisdiction?* If the defendant had authorized an attorney to appear for it on the record, in the Supreme Court, in this case, it would have been a voluntary appearance and a submission to jurisdiction, and the court would have obtained jurisdiction of the person and could have rendered a judgment in personam. How does it differ in principle that in anticipation of any and all suits which may be brought against it, it nominates a person upon whom service of process against it shall be as effectual as service of the same process upon it? In my judgment the existence of an agent made in that way, for that purpose, and upon such inducement and after such statutory agreement, meets the whole principle upon which rests a substituted service as set forth in the cases above cited."

In 1877, the requirement that foreign corporations desiring to conduct business in New York designate process agents

was repealed,[22] and immediately after, while reaffirming the authority of the *Gibbs* case,[23] the Court in two cases [24] held that by service within the state on an officer of a corporation doing no business and owning no property there, jurisdiction was acquired to render a judgment *in personam*, good at least within the state, although in the second case, the Court went on to expressly warn that it had made no determination regarding the effectiveness of the judgment elsewhere.[25] In *Pringle* v. *Woolworth* (1882) 90 N. Y. 502 the Court, in affirming the validity in New York of a judgment recovered in Pennsylvania against a New York insurance company doing business there under a statute requiring the designation of a process agent,[26] said, referring to *Lafayette*

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[22] A new Code was adopted by L. 1876, c. 448, and amended by L. 1877, c. 416. The requirement of the appointment of process agents for ordinary business corporations was repealed by L. 1877, c. 417, § 29. The requirement of the designation of process agents by foreign insurance companies remained in force (L. 1853, c. 463, §§ 14, 15, c. 466, § 23; L. 1862, c. 300, c. 367, § 5; L. 1875, c. 555, § 1; L. 1884, c. 346, § 1; L. 1892, c. 690, § 30; L. 1910, c. 634, § 12; L. 1937, c. 362). The provision is now contained in § 30 of the New York Insurance Law.

[23] *Hunt* v. *Hunt* (1878) 72 N. Y. 217, 237-238.

[24] *Hiller* v. *Burlington and M. River R. Co.* (1877) 70 N. Y. 223; *Pope* v. *Terra Haute Car Mfg. Co.* (1881) 87 N. Y. 137. In *Grant* v. *Cananea Copper Co.* (1907) 189 N. Y. 241, 250, the Court placed its decision on the federal rule, which it noted to be different from the rule of the *Hiller* and *Pope* cases. *Cf. Riverside & Dan River Cotton Mills* v. *Menefee* (1915) 237 U. S. 189, 192.

[25] 87 N. Y. p. 141.

[26] Although the record in the *Pringle* case did not show that a designation had actually been filed, the Court treated the result as equivalent (90 N. Y. pp. 509-510) and its reasoning, above quoted, is therefore authoritative as a holding regarding the effect of a designation actually filed.

Ins. Co. v. *French* (1856) 18 How. 404 and *Gibbs* v. *Queen Ins. Co., supra* (p. 509):

> "These cases determine that where an insurance company of one State does business in another, under a provision of the statute of the latter State, which makes service of process upon the designated person within such State equivalent to personal service on the corporation, the company is deemed to assent to be bound by a judgment rendered upon such service."

In *Plimpton* v. *Bigelow* (1883) 93 N. Y. 592, in refusing to permit attachment of the stock of a citizen of Pennsylvania in a Pennsylvania corporation by service of the writ on its secretary while present in New York on the corporation's business, the Court of Appeals reaffirmed its adherence to the principle that jurisdiction over foreign corporations depends on, and is limited to, their consent either express, by the designation of a process agent, or implied from doing business in the state. At pages 598-599 the Court said:

> "we regard the principle to be too firmly settled by repeated adjudications of the Federal and State courts, to admit of further controversy, that a corporation has its domicile and residence alone within the bounds of the sovereignty which created it, and that it is incapable of passing personally beyond that jurisdiction. (*Bank of Augusta* v. *Earle*, 13 Pet. 519; *Lafayette Ins. Co.* v. *French*, 18 How. [U. S.] 404; *Merrick* v. *Van Santvoord*, 34 N. Y. 208; *Stevens* v. *Phoenix Ins. Co.*, 41 id. 150.) * * * *suits by or against foreign corporations are not maintained on the theory that the corporation litigant is here in person, or that the corporate entity attends its officers in their migrations from one State to another, or that it is itself present wherever its property may be, or its business may be transacted. The jurisdiction, as I understand, rests upon the ground that as a corporation must act by agents, it may through its agent subject itself to the jurisdiction of a foreign tribunal.*"

In 1891 the Court of Appeals in *Demarest* v. *Flack*, 128 N. Y. 205 sustaining the dismissal of an action, held that the incorporation of the defendants in West Virginia must be recognized in New York and rejected the plaintiff's contention that since the defendants were all residents of New York, their incorporation in West Virginia to do business in New York was a legal fraud. The previous year the Legislature had adopted a statute called the General Corporation Law,[27] amending, codifying and amplifying the New York law on that subject. Ordinary business corporations incorporated elsewhere were in no way regulated, and the Court held that the Legislature had disclosed a policy permitting foreign corporations to do business here without conditions or restraints. At pages 216-218 the Court said:

> "When they come in our states to do business they must conform to our laws relating to foreign corporations and comply with the terms laid down by us as conditions of allowing them to transact business here. In the case of many kinds of corporations such conditions have already been imposed by our laws, and if there be any kind where none is imposed, it is conclusive evidence that up to this time the legislature has not thought it conducive to the true interests of the state and its citizens to impose them. I do not intimate that it is necessary for a state to expressly by statute exclude foreign corporations from acting within its jurisdiction. The policy of the state may exclude them and that policy may be clearly established by a reference to the general legislation of a state. *I find none such in the laws of this state.*"
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> * * * * * * * * * * * * * *
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> "The supervision of a foreign corporation by this state may easily be exercised by imposing terms as

[27] L. 1890, c. 563, pp. 1060, *et seq.*

a condition of permitting it to do business here. The absence of any such terms in our legislation forms no reason for refusing to recognize the corporation. The power rests with the legislature to say whether any, and if so what, terms shall be imposed upon such corporations as a condition of granting them permission to do business here. Those terms can only be imposed by the legislature, and in their absence our courts ought not, merely on that account, to refuse to recognize a foreign corporation. In the absence of legislation, our courts must either refuse absolutely, or else they must recognize the right of such corporations to come to this state and do business here. The courts cannot themselves impose terms or conditions."

The Court's view as to how the situation might be remedied was further clarified by its reiteration of the rule of the *Gibbs* case in its decision in *Teel* v. *Yost*, 128 N. Y. 387, 397, handed down the same day as the opinion in *Demarest* v. *Flack*:

"In Gibbs v. Queens Ins. Co. (63 N. Y. 114) it was held that where a foreign fire insurance company has designated an agent in compliance with the state insurance laws, making the appointment of an attorney or agent in this state, upon whom process in suits against the company may be served, a prerequisite to its doing business in the state, it thereby submits itself to the jurisdiction of the state courts having authority to act; and by service of a summons on an agent so designated, the court acquires jurisdiction and may render a judgment valid and capable of being enforced upon any property within the jurisdiction."

Thus by the failure to enact statutory restrictions on the right of ordinary business corporations to commence and carry on business in the state, New York opened its doors

wide to these concerns, opened its courts to them as plaintiffs and cast at least serious doubt on the power of the New York courts to obtain personal jurisdiction over them as defendants.

These alarming possibilities and the plain hints as to remedy did no longer go unheeded. At the very next session, the Legislature revamped the General Corporation Law, inserting §§ 15-16, quoted above, which forbade foreign corporations to do business until they should have filed a statement showing their authorized powers and purposes and those to be exercised in New York, and designating a process agent. It was under this statute, adopted under these circumstances, that respondent filed the designation here under consideration.

In one further case the Court of Appeals has dealt directly with the nature of a designation. In *Bagdon* v. *Philadelphia & Reading Coal & Iron Co.* (1916) 217 N. Y. 432, decided in the year before respondent filed its designation under the same statute, the defendant sought to limit the effectiveness of service on the designated agent to causes of action arising within the state. The Court overruled this contention, holding that the designation was a contractual submission to the jurisdiction of the courts, saying through Judge Cardozo (p. 437):

> "The contract deals with jurisdiction of the person. It does not enlarge or diminish jurisdiction of the subject matter. It means that whenever jurisdiction of the subject matter is present, service on the agent shall give jurisdiction of the person."

Since, as pointed out *supra*, page 2, the cause of action here asserted arose in New York, and is against a corporation doing business in New York, its subject-matter is within the jurisdiction of the courts (N. Y. Gen. Corp. Law,

§ 225) and thus within the scope of the consent arising from respondent's designation.

C. The submission to personal jurisdiction effected by the designation waived the venue restriction.

Ex parte Schollenberger (1878), 96 U. S. 369, is direct authority that respondent, by designating a process agent under the New York statute, has waived the venue defense. As the Court said (pp. 376-377):

> "It was insisted in argument that the statute confines the right of suit to the courts of the State; but we cannot so construe it. * * * While the Circuit Court may not be technically a court *of*[28] the Commonwealth; it is a court *within*[28] it; and that, as we think, is all the Legislature intended to provide for." [29]

In that case, a group of foreign insurance companies which had designated process agents under a Pennsylvania statute imposing this requirement as a condition of authority to do business in the state, were sued originally in a federal court in Pennsylvania upon process served on their designees. When the case came up, the original venue restriction of the

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[28] Emphasis by the Court.

[29] The Court continued:

> "States cannot by their legislation confer jurisdiction upon the courts of the United States; neither can consent of parties give jurisdiction when the facts do not; but both state legislation and consent of parties may bring about a state of facts which will authorize the courts of the United States to take cognizance of a case. * * *"

Judiciary Act of 1789 was in force,[30] limiting the power of the courts to compel defendants to appear before them to inhabitants of the district and persons

> "*found* [therein] *at the time of serving the writ,* • • •"

"Found" as thus used in 1789 by the First Congress evidently meant "physically found by the officer serving the writ." While an individual could be physically present for service of process, a foreign corporation could not. In *Bank of Augusta* v. *Earle, supra,* this Court had said (13 Pet. p. 588):

> "• • • a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law, and where that law ceased to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

When the *Schollenberger* case was decided, this principle was being applied in all its force, and the Court made it clear that it regarded foreign corporations as incapable of being physically found (96 U. S., pp. 377-378):

> "A corporation cannot change its residence or its citizenship. It can have its legal home only at the

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[30] The original venue clause is quoted *supra,* p. 9. The only changes made by the Act of 1875 were substitution of the words "any person" in place of "an inhabitant of the United States" and "such process" in place of "the writ". The first change only expressed what had been interpreted as the true meaning of the original enactment (*Toland* v. *Sprague, supra*).

> place where it is located by or under the authority of its charter; but it may by its agents transact business anywhere, unless prohibited by its charter or excluded by local laws. Under such circumstances, it seems clear, that it may, for the purpose of securing business, *consent to be 'found'* away from home, for the purposes of suit as to matters growing out of its transactions. The Act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and *it is one which he may waive.* If the citizenship of the parties is sufficient, *a defendant may consent to be sued anywhere he pleases,* and certainly jurisdiction will not be ousted because he has consented."

Earlier in the opinion, the Court said (96 U. S. p. 376) referring to its decision in *Railroad Co* v. *Harris* (1871), 12 Wall. 65:

> "The company objected to the jurisdiction of the court, and insisted that it was neither an inhabitant of nor found within the District. In ruling upon this objection, we held that, although the company was a foreign corporation, it was suable in the District, *because it had in effect consented to be sued there,* in consideration of being permitted by Congress to exercise therein its corporate powers and privileges. The language of the court, speaking through Mr. Justice Swayne, is: 'It (a corporation) cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that *it shall consent to be sued there.*'
>
> "Applying these principles to the present case, there cannot be any doubt, as it seems to us, of the jurisdiction of the Circuit Court over these defendant companies. *They have,* in express terms, in consideration of a grant of the privilege of doing busi-

ness within the State, *agreed that they may be sued there;* that is to say, that they may be *found*[31] there for the purpose of the service of process * * *"

When the Court referred to the defendants as being found by reason of their consents, it obviously did not mean that they had come within the terms of the statute by being actually found, but that since they had agreed to appear after notice of suit left with their designees, they could be treated *as if* they were individuals actually found: they were before the Court—it could exercise its power over their persons. And having placed themselves in that position, they could no longer avail themselves of the statutory limitations on the Court's power to compel defendants to appear before it.

Since the 1887 amendment, parties can be sued generally only in the district of their inhabitance, and in diversity cases, where found in another district only if the plaintiff is a resident of such district. In 1892 this Court held in two cases that this prevented a non-resident from suing a foreign corporation in a district in which it was doing business. (*Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202.) In the first case, no condition was imposed on the doing of business in the state by foreign corporations.[32] In the second, a statute had been passed requiring the filing of a designation. Each of these cases, we submit, was erroneous on principle for two reasons.

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[31] Emphasis by the Court.

[32] *Shaw* v. *Quincy Mining Co.*; a suit in the Circuit Court for the Southern District of New York, was commenced before the adoption of §§ 15-16 of the Gen. Corp. Law, quoted above. The situation as to the corporation's consent was thus as pointed out in *Demarest* v. *Flack*, discussed *supra*, pp. 18-20. The holding in the *Shaw* case may be sustained on that ground alone.

First. In each case the Court assumed that *Ex parte Schollenberger* had been decided on the basis that the defendants were found within the district. Since, the Court then reasoned, the 1887 amendment omitted the provision that a defendant could be sued by a non-resident plaintiff in a district wherein he was found, the amendment rendered the *Schollenberger* case no longer authoritative. Thus in the *Shaw* case, the Court said (145 U. S., p. 452):

> "The jurisdiction of the circuit court in that [Schollenberger] case, as well as in New England Mut. L. Ins. Co. v. Woodworth, 111 U. S. 138, 146, was maintained upon the ground that the defendant corporation, though incorporated in another State, yet, by reason of doing business in the State in which the suit was brought, and having appointed an agent there as required by its laws, upon whom process against the company might be served, was found in that State, within the meaning of the Act of March 3, 1875, chap. 137, § 1, then in force, and hereinbefore cited.
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> "The statute now in question, as already observed, has repealed the permission to sue the defendant in a district in which he is found • • • "[33]

In the *Denton* case, the *Shaw* case was expressly followed on the point (146 U. S., p. 205):

> "The case is governed by the decision of this court at the last term, by which it was adjudged that the Act of 1887, having taken away the alternative, permitted in the earlier acts, of suing a person in the district 'in which he shall be found', requires an action at law, the jurisdiction of which is founded only upon

[33] *New England Mut. L. Ins. Co.* v. *Woodworth*, cited by the Court, did not deal with the subject of venue. See discussion of that case, *infra*, p. 43.

> its being between citizens of different states, to be brought in the State of which one is a citizen, and in the district therein of which he is an inhabitant and resident; and that a corporation cannot, for this purpose, be considered a citizen or a resident of a State in which it has not been incorporated. Shaw v. Quincy Mining Co., 145 U. S. 444, 449, 453."

But as shown above, the *Schollenberger* decision rested, and necessarily rested, not on the defendants being actually found in the district but upon their having brought themselves before the Court and having thereby waived the right to assert limitations on the power of the Court to compel them to come before it. That waiver, once given, was effective with respect to whatever limitations there were, whether dependent on the defendant's inhabitancy or presence in the district, under the original Judiciary Act, or also, in a diversity case, on the residence of the plaintiff, under the 1887 amendment. The 1887 amendment, varying these limitations, could not detract from the effect of an agreement which brought the defendants into court, thus waiving any and all restrictions on the power of the court to compel them to appear there. That agreement, held in the *Schollenberger* case to have waived the 1789 requirement that the defendant be an inhabitant or found within the district, on principle was equally effective under the 1887 amendment, which, in a diversity case, permitted a non-resident defendant found in the district to be sued only by a resident plaintiff.

Second. The *Shaw* and *Denton* cases each depends on two principles fundamentally inconsistent with each other. In the *Shaw* case, the Court, as authority for its holding that the defendants could have no inhabitance outside of the states in which they were incorporated, relied on the

principle laid down in *Bank of Augusta* v. *Earle* that a corporation could have no existence outside of such state. After quoting Chief Justice TANEY's famous dictum in that case set forth *supra*, p. 22, the Court said (145 U. S., p. 450):

> "This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the State by which it was created, although it may do business in other states whose laws permit it."

Nevertheless the Court permitted the Quincy Mining Company to interpose the venue defense, thus necessarily holding that the consent of a foreign corporation is a mere consent to be found for service of process: something less than a consent to appear, leaving it open to the corporation when served, to object to the means taken to bring it before the court. In the *Denton* case, the two inconsistent propositions were expressed as follows (146 U. S. pp. 207-208):

> "Moreover, the supposed agreement of the corporation went no further than to stipulate that process might be served on any officer or agent engaged in its business within the State. * * * The agreement, if valid, might subject the corporation, after due service on its agent, to the jurisdiction of any appropriate court of the State. Lafayette Ins. Co. v. French, 59 U. S. 18 How. 404. It might likewise have subjected the corporation to the jurisdiction of a circuit court of the United States held within the State—so long as the judiciary acts of the United States allowed it to be sued in the district in which it was found. Ex parte Schollenberger, 96 U. S. 369; New England Mut. L. Ins. Co. v. Woodworth, 111 U. S. 138; Re Louisville Underwriters, 134 U. S. 488. But such an agreement could not, since Congress (as held

in Shaw v. Quincy Mining Co. above cited) has made citizenship of the State, with residence in the district, the sole test of jurisdiction in this class of cases, estop the corporation to set up non-compliance with that test, when sued in a circuit court of the United States."[34]

But under Chief Justice TANEY's concept, anything less than a consent to be sued would be ineffective to bring a corporation into any court outside of its state of origin, when sued by any plaintiff, resident or non-resident. Thus the *Shaw* and *Denton* decisions are each internally inconsistent, as well as incorrect in supposing that the *Schollenberger* case was or could be based on a consent to be "found" or "served" and nothing more.

The distinction between the express contractual consent arising from the voluntary designation of a process agent and the legal fiction of consent implied against a foreign corporation which does not designate a process agent, although not referred to in the *Shaw* and *Denton* cases, was expressly taken by this Court in *Penn. Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.* (1917) 243 U. S. 93. In that case the Court refused to regard as applicable to a case where express consent to be sued had been given through the designation of a process agent, the rule of *Old Wayne Mutual Life Assn.* v. *McDonough* (1907) 204 U. S. 8 and *Simon* v. *Southern Ry. Co.* (1914) 236 U. S. 115, where

[34] In *In re Louisville Underwriters*, it was held (1) that the venue clause was not applicable to suits in admiralty; (2) that by reason of the consents arising from their designation of process agents, the defendant foreign corporations could be sued in a federal court of the state where the designations were filed.

it was said of a corporation which had not designated a process agent (236 U. S. p. 130):

> "the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states."

In the *Penn. Fire Ins. Co.* case this Court held the defendant foreign corporation subject to a broader liability to suit because of its designation, saying (243 U. S. p. 95):

> "If by a corporate vote it had accepted service in this specific case, there would be no doubt of the jurisdiction of the state court over a transitory action of contract. If it had appointed an agent authorized in terms to receive service in such cases, there would be equally little doubt. New York, L. E. & W. R. Co. v. Estill, 147 U. S. 591. It did appoint an agent in language that rationally might be held to go to that length. The language has been held to go to that length, and the construction did not deprive the defendant of due process of law even if it took the defendant by surprise, which we have no warrant to assert."

Thus the construction given to the fiction of consent implied against a foreign corporation which does business in a state without designating a process agent will not determine the construction to be given to the express consent to be sued which results where a process agent is designated. That is a voluntary contract to appear in the courts after notice to the designee, which must be given effect in accordance with the expressed intention of the parties. As decided in the *Schollenberger* case, respondent, by designating a process agent under the New York statute, has agreed, after notice to its designee, to appear in any New York court, state or federal, having jurisdiction of the sub-

ject matter, and has waived the right to assert the restrictions of the venue statute on the power of the Court below to compel it to appear.[35]

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[35] Since the 1887 amendment the *Schollenberger* case has been followed in *Oklahoma Packing Co.* v. *Oklahoma Gas & Elec. Co.* (C. C. A. 10, 1939) 100 F. (2d) 770, cert. granted 306 U. S. 629; *Shainwald* v. *Davids* (D. C. N. D. Cal. 1895) 69 Fed. 704; *Consol. Store-Service Co.* v. *Lamson Consol. Store-Service Co.* (C. C. Mass. 1890) 41 Fed. 833. The holding of the *Consolidated Store-Service Co.* case on this point was expressly approved by the First Circuit Court of Appeals in *Haight & Freese* v. *Weiss* (1907) 156 Fed. 328, 329-330. The same result was reached in *Dodge Mfg. Co.* v. *Patent* (D. Ind. 1928) 23 F. (2d) 852, affirmed on the ground that the corporation had become a resident (C. C. A. 7, 1932) 60 F. (2d) 676, discussed *infra*, p. 52, note 50.

Under the Act of August 13, 1894, c. 282, § 2, 28 Stat. 279, 6 U. S. C. A. 7 requiring companies desiring to act as surety on bonds for federal improvements to designate process agents, such designation enables a non-resident surety to be sued by a non-resident plaintiff (*U. S.* v. *Sheridan* (W. D. Ky. 1902) 119 Fed. 236).

The *Denton* case has been expressly followed regarding the effect of a designation as a waiver of the venue defense in *McLean* v. *Mississippi* (C. C. A. 5, 1938) 96 F. (2d) 741 cert. denied 305 U. S. 623; *Hamilton Watch Co.* v. *George W. Borg Co.* (N. D. Ill. 1939) 27 F. Supp. 215; *Standard Stoker Co.* v. *Lower* (D. Md. 1931) 46 F. (2d) 678; *Platt* v. *Mass. R. E. Co.* (D. Mass. 1900) 103 Fed. 705. That no waiver results from the designation of a process agent was held in *Beech-Nut Packing Co.* v. *P. Lorillard Co.* (S. D. N. Y. 1921) 287 Fed. 271 on the authority of the *Shaw* case and in *Heine Chimney Co.* v. *Rust Engineering Co.* (C. C. A. 7, 1926) 12 F. (2d) 596 on the authority of *In re Keasbey & Mattison Co.* (1895) 160 U. S. 221. It is difficult to see how any waiver could have arisen in the *Heine Chimney Co.* case since that was a suit for patent infringement and the state courts had no jurisdiction of the subject-matter (Judicial Code, § 256, 28 U. S. C. A. 371[5]).

The Texas statute considered in the *Denton* case is unlike the Pennsylvania statute construed in the *Schollenberger* case and the New York statute under which respondent filed its designation here. In the Texas statute, an attempt was made to curtail the jurisdiction of the federal courts as local courts in diversity cases by a provision that any foreign corporation removing a case should lose its authority to do business in the state. In enacting §§ 15-16 of the General Corporation Law, the New York Legislature expressly rejected a proposal to include a similar provision. Instead, the law passed merely referred in general terms to service in suits against the designating corporation, like the Pennsylvania statute which this Court in the *Schollenberger* case had held fully applicable to the local federal courts. The *Denton* case, therefore, confined to what was there considered, is not authority against the proposition that respondent's designation under the New York statute waived the federal venue defense.[36]

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[36] The Texas statute, L. 1887, c. 128, because of the provision against removals, was declared unconstitutional by the Supreme Court of Texas two years before the *Denton* case reached this Court (*Texas Land & Mtg. Co.* v. *Worsham* (1890) 76 Tex. 556, 13 S. W. 1384). It had been repealed three years before (L. 1889, c. 78, § 2). In the *Denton* opinion itself, before expressing itself as quoted at pp. 27-28 above regarding the effect of a designation thereunder, this Court declared the statute "unconstitutional and void". For that reason, held the Court (146 U. S. p. 207)

> "it could give no validity or effect to any agreement or action of the corporation under obedience to its provisions."

The New York Legislature took the action above described on May 18, 1892, six months before this Court handed down

II

Bethlehem is an inhabitant of the Southern District of New York within the meaning of the venue provision.

The question here presented, whether a corporation incorporated under the laws of a state in which none of its business is done, and having its executive office in another state, is an inhabitant of the latter state within the meaning of § 51 of the Judicial Code, has never been decided by this Court.

The answer depends on the meaning to be ascribed to the word "inhabitant" in the provision that "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." That is a reenactment of the venue clause of the Judiciary Act of 1789, which has been in force by successive reenactments continuously since 1789.[37] While other portions of the statute have been eliminated and new words added by subsequent amendments, the clause in question has been continued in precisely the same language as that in which it was orig-

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its opinion in the *Denton* case on November 21, 1892. See Birdseye, Cummings & Gilbert's N. Y. Consol. Laws, vol. 2, p. 1979.

The Pennsylvania statute considered in the *Schollenberger* case is printed in the appendix.

[37] Sept. 24, 1789, c. 20, § 11; Rev. Stat. § 739; Mar. 3, 1875, c. 137, § 1, 18 Stat. 470; Mar. 3, 1887, c. 373, § 1, 24 Stat. 552; Aug. 13, 1888, c. 866 § 1, 25 Stat. 433; Mar. 3, 1911, c. 231, § 51, 36 Stat. 1101; Sept. 19, 1922, c. 345, 42 Stat. 849; Mar. 4, 1925, c. 526, § 1, 43 Stat. 1264; Apr. 16, 1936, c. 230, 49 Stat. 1213.

inally enacted. The language of the provision must therefore have the same meaning as in 1789.

A. "Citizen" in the jurisdiction clause and "inhabitant" in the venue clause are not synonymous. In the two clauses Congress deliberately used a different word to convey a different meaning.

That the word "inhabitant" was intended to convey a different and broader meaning than the term "citizen" becomes clear upon studying the language of the provision as originally enacted, either separately or in its context, and in the light of its object and purpose.

The word "inhabitant" on its face has a meaning different from the word "citizen". The use of "citizen" in one clause and "inhabitant" in a following clause itself raises a presumption that the two different words were used in two different meanings. That they were so used was held by Mr. Justice STORY in *Picquet* v. *Swan, supra,* 5 Mason p. 46, and by this Court in *Toland* v. *Sprague, supra,* and in *Galveston, &c. Ry. Co.* v. *Gonzales* (1894) 151 U. S. 496, 500, and has been recognized in other decisions of this Court.[38]

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[38] In *Toland* v. *Sprague, supra,* it was held that a citizen of the United States residing in Gibraltar was not an inhabitant of the United States. In *Steigleder* v. *McQuesten* (1905) 198 U. S. 141, the Court said (p. 143):

> "But it has long been settled that residence and citizenship were wholly different things within the meaning of the Constitution and the laws defining and regulating the jurisdiction of the circuit courts of the United States; and that a mere averment of residence in a particular state is not an averment of citizenship in that state for the purposes of jurisdiction." (Citing cases.)

To the same effect, see *Pioneer Southwestern Stages, Inc.* v. *Wicker* (C. C. A. 9, 1931) 50 F. (2d) 581, 582.

In *Grace* v. *American Central Ins. Co.* (1883) 109 U. S. 278, the Court held an allegation that defendant partnership is doing business in New York and is composed of individuals who are residents of a state other than that of which plaintiff is a citizen insufficient to establish defendants' citizenship, saying (p. 284):

> "The record, however, fails to show of what state the defendants are citizens. They may be doing business in and have a residence in New York without, necessarily, being citizens of that state."

Additional evidence that the word "inhabitant" in the second clause was not used in the restrictive sense of the word "citizen" in the first clause is found in the fact that the phrase "whereof he is an inhabitant" was coupled with the phrase "or in which he shall be found at the time of serving the writ." If the venue provision had been intended to operate as narrowly as the jurisdiction provision, the last mentioned words would not have been added. Read together the two phrases disclose the original intent of Congress that the circuit court in any district should have jurisdiction over the persons of all defendants residing there or present there for the service of process. It was intended to exempt only those defendants who neither resided in the district nor could there be served with process.

This intent is further evidenced by the fact that the clause in question is supplementary to the preceding provision that "no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court." The purpose of the original venue provision was to protect parties from being sued in districts distant from their homes. The venue provision was enacted as an incident to the territorial limitation on the jurisdiction of

the federal courts. Congress might have given each circuit court, in cases within its jurisdiction, power to let its process run throughout the United States. Instead it limited their process to run only against persons within the district; and it was for this reason that the venue provision was enacted, authorizing each court to adjudicate only over those who were inhabitants of the district or found therein.[39] Since until the amendment of 1887 it was sufficient if a defendant was either an inhabitant of the district or found therein, there was no occasion before that time to consider what was the distinction between those two terms. It would seem that a person was found in a district if he was there present even temporarily so that he could be served with process, whereas inhabitancy denoted presence of a more regular and perma-

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[39] It was so held in *Toland* v. *Sprague, supra,* where the Court said (12 Pet. pp. 328, 329):

> "Congress might have authorized civil process from any circuit court to have run into any State of the Union. It has not done so * * *. We think that the opinion of the Legislature is thus manifested to be that the process of a circuit court cannot be served without the district in which it is established, without the special authority of law therefor."

And the Court based its decision upon the following conclusions (p. 330):

> "1st. That by the general provisions of the laws of the United States, the circuit courts can issue no process beyond the limits of their districts. 2d. That independently of positive legislation the process can only be served upon persons within the same districts * * *"

nent character.[40] There is nothing to indicate that either term was used as synonymous or co-extensive with the term "citizen" in the preceding clause prescribing the jurisdiction of the federal courts.

On the contrary, the two clauses were enacted for entirely different purposes. The first clause (corresponding to § 24 of the Judicial Code) dealt with the jurisdiction of the federal courts as to subject-matter; the second clause (corresponding to § 51 of the Judicial Code) dealt with jurisdiction over the person, prescribing the district in which a defendant might be sued in a federal court having jurisdiction of the subject-matter.[41] Jurisdiction of a federal court

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[40] This view was taken by Mr. Justice STORY in holding in *Picquet v. Swan, supra* (5 Mason p. 46), that Congress did not intend to subject to the jurisdiction of the federal courts aliens who could not be served with process:

> "My opinion is, that no suit should lie against any person, who was not locally present, either as an inhabitant, or in transitu in the United States; and that it designedly enlarged the power to proceed in cases of inhabitancy, where the party happened at the time to be absent without any intentional change of domicile, as well as allowed it in any district, where the party might, at the time, be found. * * * Alienage or citizenship is one thing; and inhabitancy, by which I understand local residence, animo manendi, quite another."

Cf. *Holmes* v. *Oregon & California Ry. Co.* (D. C. Or. 1881) 5 Fed. 523, 526, 527; *Bicycle Stepladder Co.* v. *Gordon* (C. C. Ill. 1892) 57 Fed. 529, 531; *Marks* v. *Marks* (D. C. Tenn. 1896) 75 Fed. 321, 324, 325, 331, 332.

[41] The distinction between jurisdiction and venue was taken at an early date by MARSHALL, C. J., in *Gracie* v.

over the subject-matter in diversity of citizenship cases depended on the citizenship of the parties; jurisdiction over the person by the federal court in a particular district

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Palmer, supra (8 Wheat., p. 699), holding that it was unnecessary to aver on the record that defendant was an inhabitant of the district or was found therein:

> "That it was sufficient if the court appeared to have jurisdiction by the citizenship or alienage of the parties."

In *Toland* v. *Sprague, supra,* the venue provision was held to be based on the principle that (12 Pet., p. 329)

> "Nothing can be more unjust than that a person should have his rights passed upon, and finally decided by a tribunal, without some process being served upon him by which he will have notice, which will enable him to appear and defend himself."

and was, therefore, applicable to a citizen of Massachusetts domiciled in Gibraltar and therefore not an inhabitant of the United States, since with respect to those who were not inhabitants of the United States

> "it was not in the contemplation of Congress that they would be at all subject, as defendants, to the process of the circuit courts, which, by reason of their being in a foreign jurisdiction, *could not be served upon them* * * *"

The Court speaks of those not inhabitants as (p. 330)

> "those whom the Legislature did not contemplate as being *within the reach of the process of the courts,* * * *"

The Court further said (p. 331):

> "The court had jurisdiction over the parties and the matter in dispute; the objection was that the party defendant, not being an inhabitant of Pennsylvania,

depended on the defendants being inhabitants of the district or found therein.[42]

The assumption that inhabitancy in a district for the purpose of venue is synonymous with and dependent upon citizenship of the state for the purpose of jurisdiction is

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nor found therein, *personal process could not reach him;* * * *"*

In *Western Loan & Savings Co.* v. *Butte & Boston Consol. Mining Co.* (1908) 210 U. S. 368, 372, holding that the objection to venue was waived by appearance and pleading, the Court said (p. 372):

> "We are of opinion that the defendant had waived objection to *jurisdiction over its person,* and, by filing the demurrer on the ground stated, *submitted to the jurisdiction* of the Circuit Court."

In *Seaboard Rice Milling Co.* v. *Chicago, R. I. & Pac. Ry. Co.* (1926) 270 U. S. 363, 366, the Court said of the argument that a case cannot be removed to a federal court unless it could have been brought in the federal court in the first instance:

> "The fallacy of this argument lies in the failure to distinguish between the general jurisdiction of the district courts, to which § 28 relates, and *the local jurisdiction over the person of the defendant,* to which § 51 relates."

See also *Interior Construction & Imp. Co.* v. *Gibney, Macon Grocery Co.* v. *Atlantic Coast Line* and *Camp* v. *Gress,* quoted from *supra,* p. 10, holding that the venue clause relates only to jurisdiction over the person of the defendant, as distinct from jurisdiction of the subject-matter.

[42] Failure at times to recognize the fundamental distinction between the jurisdiction clause and the venue provision has resulted in some confusion in the opinions of this Court. So recently as 1923 the Court found it necessary expressly to overrule, on that ground, its prior decision in *Ex parte Wisner.* See note 11, *supra,* p. 9.

thus contrary to the language of the statute and to its objects as stated by this Court. Consequently it does not follow from the rule established by decisions of this Court holding a corporation, for the purpose of the jurisdiction of federal courts as such, to be a citizen of the state of its incorporation and of no other state, that a corporation is, for the purpose of the venue provision, an inhabitant or resident of the state of its incorporation and of no other state.

B. This Court has never decided the question here presented, whether a corporation incorporated on paper in one state, where it does no business, is an inhabitant of another state, where it has its business headquarters, where its directors meet, its chief executives have their offices, and where it is permitted by both states to do business. All that has actually been held by this Court is that for venue purposes, a corporation incorporated in one state, where it does some of its business, does not become an inhabitant of another state by doing a part of its business there. A holding that respondent is an inhabitant of the Southern District of New York is not inconsistent with anything decided by this Court and is required by the intention of Congress expressed in the statute.

This Court has gone no further in its actual decisions than to hold that a corporation incorporated in one state is not an inhabitant of another state merely because it does business there—in other words, that a corporation is not an inhabitant of every state in which it does business, irrespective of the amount and character of that business. This Court has never held that a corporation which, like respondent here, has merely a paper incorporation in a state in

which it does no business, is not an inhabitant of the state in which its principal executive offices are located and where in a real sense it has its business situs.

The Judiciary Act did not mention corporations. Its language on its face applied only to individuals. Whether since in 1789 corporations were not a factor, Congress did not at that time contemplate them as parties to suits in the federal courts, or whether Congress deliberately left it to this Court to apply to corporations by analogy the rules laid down for individuals, is immaterial, since in either view it has fallen to this Court to decide how the principles expressed in the statute are applicable by analogy to corporations.

The application of the Act to corporations has occasioned much difficulty. This Court has found it necessary from time to time to change its point of view, and to disregard general language found in earlier opinions not necessary to the point decided. At an early day it held that a corporation is not a citizen within the meaning of the provision of the constitution entitling citizens of a state to the privileges and immunities of citizens in other states.[43] In order to hold that a corporation can nevertheless sue and be sued in the federal courts under the diversity of citizenship clause of the Judiciary Act, the Court at first disregarded the corporate entity entirely and made the jurisdiction of the federal courts depend upon the citizenship of its members,[44] but soon abandoned this theory for a double fiction, *viz.*, that a corporation merely represents its stockholders and that they are presumed to be citizens of the state of incor-

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[43] *Insurance Co.* v. *French*, *supra*; *Paul* v. *Virginia* (1869) 8 Wall. 168.

[44] *Bank of U. S.* v. *Deveaux* (1809) 5 Cranch 61.

poration.[45] Since then, the Court has abandoned these fictions, and has established the principle that a corporation has a separate existence apart from its members.[46] The rule established by this Court that, for purposes of diversity of citizenship jurisdiction, a corporation is to be regarded as a citizen of the state of its incorporation, rests, it is submitted, on a more practical foundation than a resort either to the fiction that a corporation represents its members or to the fiction that a corporation is a citizen. Congress intended that the federal courts should have jurisdiction over all suits between citizens of different states; to exempt corporations from federal jurisdiction would obviously defeat that purpose; and since a simple criterion of jurisdiction is contemplated, corporations are regarded by analogy as if they were citizens of the state of incorporation, for purpose of federal jurisdiction.[47]

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[45] *Railroad Co.* v. *Letson* (1844) 2 How. 497; *Marshall* v. *Railroad Co.* (1853) 16 How. 314, 327, 328; *Muller* v. *Dows* (1877) 94 U. S. 444.

In *Doctor* v. *Harrington* (1905) 196 U. S. 579, 586, 587 the Court spoke of "the assumption adopted by this court, that stockholders of a corporation are citizens of the state which created the corporation, an assumption physically possible, but hardly true in a single instance;" explained that the fiction had been devised for the purpose of permitting corporations to be sued in federal courts though not citizens, and said: "This, then, was its purpose, and to stretch beyond this is to stretch it to wrong."

[46] *Donnell* v. *Herring-Hall-Marvin Safe Co.* (1908) 208 U. S. 267, 273; *Klein* v. *Board of Tax Supervisors* (1930) 282 U. S. 19, 24.

[47] Substantially this view is indicated by opinions of this Court. In *Paul* v. *Virginia, supra,* it was held that a corporation is not a citizen but that (8 Wall. pp. 177-178):

> "where contracts or rights of property are to be enforced by or against corporations, the courts of the

The assumption that a corporation cannot be an inhabitant of a state other than that of its incorporation, found in general expressions of this Court, is based on the fiction mentioned above with respect to the citizenship of corporations, extends that fiction beyond its original purpose, and arises from the failure to recognize the essential difference between the jurisdiction provision and the venue provision.

While the question whether a corporation can be an inhabitant of a state other than that of its creation had never been passed upon by this Court before the decision in 1892 of *Shaw* v. *Quincy Mining Co., supra,* upon which respondent chiefly relies, earlier decisions had appeared to indicate an affirmative answer. In *Railroad Co.* v. *Harris, supra,* the Court held a railroad corporation incorporated in Maryland but extending its lines into the District of Columbia under an Act of Congress authorizing it to do so, suable in the courts of the District of Columbia under a provision of the Act authorizing suit against a defendant who was an inhabitant of or found in the District in substantially the same language as the venue provision. The Court said:

> "Nor do we see any reason why one state may not make a corporation of another state, as there organized and conducted, *a corporation of its own quoad hoc any property within its territorial jurisdiction.*"

> United States will, for the purpose of maintaining jurisdiction, * * * treat a corporation as a citizen within the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different States."

In *Railroad Co.* v. *Harris, supra,* the Court said (12 Wall., pp. 81-82):

> "For the purposes of federal jurisdiction it [the corporation] is *regarded as if it were a citizen of the state where it was created,* * * *"*

In Ex parte Schollenberger, supra, the Court expressly left open the question whether a New York insurance corporation licensed to do business in Pennsylvania and designating an agent for service of process there could be regarded as an inhabitant of Pennsylvania, within the meaning of the venue provision (96 U. S. p. 375). In *Railroad Co.* v. *Koontz* (1881) 104 U. S. 5, 12, the Court said, while holding that a Maryland railroad corporation operating a leased line in Virginia did not thereby become a citizen of Virginia, and could remove a suit against it by citizens of Virginia in the Virginia State Court to the federal court:

> "A corporation may, for the purposes of suit, be said to be born where by law it is created and organized and to reside *where by or under the authority of its charter its principal office is.* • • • It cannot migrate nor change its residence *without the consent, expressed or implied, of its State,* but it may transact business wherever its charter allows, unless prohibited by local laws."

In *New England Mut. Life Ins. Co.* v. *Woodworth, supra,* it was held that a Massachusetts insurance company doing business in Illinois with an agent designated pursuant to statute, had a domicile in Illinois so that its indebtedness on a life insurance policy issued in Michigan to a resident of Michigan was assets in Illinois entitling the policyholder's personal representative to take out letters of administration in Illinois and bring suit there. The Court, after referring to the laws of Illinois requiring the designation of an agent for service of process as a condition of doing business, said (111 U. S. p. 145):

> "In view of this legislation and the policy embodied in it, when this corporation, not authorized under the laws of Illinois, has, by virtue of those laws a place of business in Illinois and a general agent there, and a resident attorney there for the

> service of process and can be compelled to pay its debts there by judicial process and has issued a policy, payable on death, to an administrator, *the Corporation must be regarded as having a domicile here*, in the sense of the rule that the debt on the policy is assets at its domicile, so as to uphold the grant of letters of administration there."

This was the state of the decisions of this Court when *Shaw v. Quincy Mining Co.* was decided. Shortly before that case was argued, Mr. Justice HARLAN, sitting at circuit, had presented to him the question whether a corporation was an inhabitant, within the meaning of the venue statute, of a state other than that of its incorporation in which it maintained an office and transacted business (*U. S.* v. *Southern Pacific R. Co.* (C. C. N. D. Cal. 1892) 49 Fed. 297). He reviewed the authorities and found that the decisions of this Court had left the question open. He said (p. 302):

> "A corporation of one state, by engaging in business or acquiring property in another state, does not thereby cease to be a citizen of the state creating it (Insurance Co. v. Francis, 11 Wall. 210) although, while the Act of 1875 was in force, it could be 'found' in any state where it did business regularly by its agents, process being served upon such agents. Ex parte Schollenberger, 96 U. S. 369. In the latter case the court was careful to say that it was unnecessary to inquire whether such a corporation was not also, within the meaning of the Act of 1875 an inhabitant of the state in which it did business."

His conclusion was as follows (pp. 303-304):

> "If it be said that inhabitancy in a state, in its strict legal sense, implies a permanent, fixed residence in that state, the answer is that a corporation of one state, operating, by agents, a railroad or a telegraph line in another state, with its consent, or under its license, may be regarded as permanently

identified with the business and people of the latter state, and, for the purposes of its business there, to have a fixed residence within its limits; for it may not unreasonably be assumed that it will exert its powers there during the whole of its corporate existence, or so long as it is profitable to do so. It does there just what it would do if it had received its charter from that state. It seems to the Court that a corporation of a state, or a corporation of the United States, holding such close relations with the business and people of another state, may, within a reasonable interpretation of the Act of 1887, be deemed an 'inhabitant' of the latter state for all purposes of jurisdiction *in personam* by the courts held there; although a corporation is, and, while its corporate existence lasts must remain, a 'citizen' only of the state which gave it life."

In *Shaw* v. *Quincy Mining Co., supra,* the Court held that a Michigan mining corporation, conducting its mining operations in Michigan and having business offices in New York and Michigan, was not an inhabitant of New York within the meaning of the venue provision, and that therefore the Circuit Court for New York could not acquire jurisdiction of it by service upon its secretary in New York at the suit of a citizen in Massachusetts. The Court held that the term "inhabitant" was used in the statute as synonymous with the term "citizen", and since it had been established by the decisions of the Court that a corporation was to be treated for purposes of jurisdiction as a citizen of the state of its incorporation and of no other state, it necessarily followed that it likewise could not be an inhabitant of any other state. The premise that the term "inhabitant" was synonymous with the term "citizen" was set up as follows, referring to the Judiciary Act of 1789 (145 U. S. p. 447):

"The word 'inhabitant,' in that Act was apparently used, not in any larger meaning than 'citizen'

> but to avoid the incongruity of speaking of a citizen of anything less than a State, when the intention was to cover not only a district which included a whole State, but also two districts in one State, like the two districts of Maine and Massachusetts in the State of Massachusetts, and the districts of Virginia and Kentucky in the State of Virginia, established by § 2 of the same Act."

The broad general principle enunciated in the opinion, and repeated in subsequent opinions, rests entirely on this premise. Having assumed this relationship between the terms "inhabitant" and "citizen", the Court, applying the statement in *Bank of Augusta* v. *Earle, supra,* that a corporation cannot exist outside of the state of its incorporation, arrived (145 U. S. p. 450) at the general conclusion (quoted *supra,* p. 27) that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of a corporation can only be in the state by which it was created, although it may do business in other states.

This general proposition was broader than the facts of the case required, and was broader than was warranted by previous decisions. As shown above, the question whether a corporation could be an inhabitant of a state other than that of its incorporation had never been passed upon by this Court; its previous holdings having been as to citizenship. From an early date, in cases regarding individuals, this Court had recognized a distinction between citizenship and inhabitancy. The identification of citizenship with inhabitancy, suggested for the first time in the *Shaw* case, more than a hundred years after the enactment of the Judiciary Act, rests upon an assumption as to what Congress had "apparently" intended, an assumption not borne out by any reference to authority or reason, or to anything in the history of the Act. Doubt on the part of the Court as to

the validity of this assumption is indicated by the sentence immediately following that setting forth the assumption and quoted above, recognizing that this Court had held that

> "in the common use of words, a resident might not be a citizen * * *."

The opinion fails, however, to give any adequate reason for thus departing from the presumption that Congress employed the term "resident" in its "common use".

The assumption is contrary to the view of Mr. Justice STORY, repeatedly approved by this Court, that citizenship on the one hand and inhabitancy or residence on the other hand, have different meanings. And it ignores the essential difference between the objects and purposes of the jurisdiction provision and the venue provision, recognized by this Court prior to the decision in the *Shaw* case and subsequently expressly reaffirmed by repeated decisions of this Court.[48]

Mr. Justice HARLAN dissented in the *Shaw* case, and that the majority of the Court may have had some doubt as to the soundness of the general propositions set forth in the opinion is indicated by the care with which, in closing, it declared that the effect of its decision was to be confined to the matter actually decided, saying (145 U. S. p. 453):

> "All that is now decided is that under the existing Act of Congress a corporation incorporated in one State only, cannot be compelled to answer, in a Circuit Court of the United States held in another

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[48] Cf. *Camp* v. *Gress, supra,* where the Court on an analogous question apparently indicated doubt as to the correctness of the assumption in the *Shaw* case that the construction of the venue clause is to follow the construction of the jurisdiction clause (250 U. S. p. 312).

> State in which it has a usual place of business, to a civil suit at law or in equity brought by a citizen of a different State."

The general principle expressed in the *Shaw* case has been repeated in four other decisions of this Court, none of which, however, actually decided anything more than was decided in the *Shaw* case, *viz.*: that a corporation does not become an inhabitant of a state other than that of its incorporation by merely doing some of its business in the former. In *Southern Pacific Co.* v. *Denton, supra*, a Kentucky railroad corporation running its cars through Texas was held not suable in the Circuit Court for the Western District of Texas at the suit of a resident of the Eastern District of Texas. The Court (146 U. S. p. 205) followed the *Shaw* case, stating (as quoted *supra*, pp. 25-26) that for the purpose of the requirement of the venue clause as amended in 1887 that one of the parties to a diversity suit be an inhabitant of the district, a corporation can not be considered a citizen or a resident of a state in which it has not been incorporated. In *In re Keasbey & Mattison Co.* (1895) 160 U. S. 221, the Court held that a Massachusetts corporation doing business in New York and having there an office and a general agent could not be sued by a Pennsylvania corporation in a Circuit Court for New York. It does not appear where the cause of action originated. The Court again followed the *Shaw* case, stating the rule as follows (p. 229):

> "And it is established by the decisions of this court that, within the meaning of this act, a corporation cannot be considered a citizen, an inhabitant, or a resident of a state in which it has not been incorporated; and, consequently, that a corporation incorporated in a state of the Union cannot be com-

> pelled to answer to a civil suit at law or in equity, in a circuit court of the United States held in another state, even if the corporation has a usual place of business in that state."

In *Macon Grocery Co.* v. *Atlantic Coast Line, supra*, 215 U. S. p. 508, the Court held on the authority of the *Keasbey & Mattison Co.* case that railroad companies incorporated in states other than Georgia but operating in Georgia were not inhabitants of Georgia within the meaning of the venue provision. In *Seaboard Rice Milling Co.* v. *Chicago, R. I. & Pac. Ry. Co.* (1926) 270 U. S. 363, 366, the Court held that a corporation organized under the laws of Illinois and Iowa, having its principal office in Chicago and a branch line in Missouri, could not be sued in a District Court for Missouri by a Texas corporation,

> "a corporation being, within the meaning of the jurisdictional statutes, a resident of the state in which it is incorporated, and not a resident or inhabitant of any other state, although it may be engaged in business within such other state."

This sweeping statement of a general principle is thus based entirely on the gratituitous assumption in the *Shaw* case that inhabitancy is identical with citizenship and that decisions under the jurisdiction clause are determinative of questions under the venue clause. No such statement of general principle was required for the decision of any of the cases cited. The actual point decided did not go further than the limits expressed in the concluding sentence of the opinion in the *Shaw* case, quoted above, that a corporation incorporated in one state and transacting its business there does not become an inhabitant of another state merely by there transacting a portion of its business through agents appointed by it for that purpose.

The Court may hold on further consideration that those decisions go too far, and that the proper rule is that a corporation is an inhabitant of every state in which it transacts business to a substantial extent, and in which it has a permanent location for purposes of jurisdiction or taxation.[49] But for the purpose of the present case, it is

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[49] A holding that a corporation is an inhabitant of a place where it functions would be recognition of the principles laid down in English decisions cited in *Bank of United States* v. *Deveaux, supra*, 5 Cranch pp. 89-90, and in *Railroad Co.* v. *Letson* (1844) 2 How. 497, 557, that under English rate statutes a corporation was to be considered an inhabitant of any district in which it held lands,

"though they reside elsewhere."

The early decisions in this Court contemplated only the case of corporations organized in a state and doing business in the same state. The modern migratory corporation was then unknown. Thus in *Railroad Co.* v. *Letson, supra*, the Court said (2 How. pp. 558-559):

> "a corporation created by *and doing business in a particular State*, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State, for the purposes of its incorporation, capable of being treated as a citizen of that State, as much as a natural person. • • • it is substantially within the meaning of the law a citizen of the State which created it, *and where its business is done*, for all the purposes of suing and being sued. • • • *When the corporation exercises its powers in the state which chartered it*, that is its residence, • • • "

The importance of the location of a corporation's principal office and activities has likewise been recognized in later cases, such as *Railroad Co.* v. *Koontz*, discussed *supra*, p. 43. (Continued p. 51)

not necessary to go so far. Petitioner's proposition that a corporation having a paper incorporation in one state in which it does no business, having its executive office and

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In *Galveston, &c. Ry. Co.* v. *Gonzales, supra,* holding that a Texas railway company having its principal office in the Eastern District of Texas and running its railway and having an office in the Western District of Texas could not be sued in the latter district by an alien, the Court said (151 U. S. p. 504):

> "In the case of a corporation the question of inhabitancy must be determined, not by the residence of any particular officer, but by the principal offices of the corporation, *where its books are kept and its corporate business is transacted,* even though it may transact its most important business in another place."

In determining whether suit in the courts of a state other than that in which it is incorporated would constitute a burden on interstate commerce this Court has referred to corporations as residents of "foreign" states in which they have offices and carry on their corporate functions. Thus in *Missouri ex rel. St. Louis, Brownsville & Mexico Ry.* v. *Taylor* (1924) 266 U. S. 200, Mr. Justice BRANDEIS, writing for this Court, said in referring to a corporation organized under the laws of Delaware (p. 207):

> "• • • the plaintiff consignee is a resident of Missouri—that is, has a usual place of business within the state."

And in *International Milling Co.* v. *Columbia Transp. Co.* (1934) 292 U. S. 511, this Court, speaking through Mr. Justice CARDOZO, while recognizing the rule of venue declared in the *Shaw* and *Seaboard* cases said (p. 519):

> "• • • the petitioner, though a Delaware corporation is suing in the state of its business activities. For

its actual business situs in another state, is an inhabitant of the latter state within the meaning of the venue provision, is not inconsistent with the theory underlying the decisions of this Court above discussed, that a corporation incorporated in one state and there transacting business is an inhabitant of that state, and is not an inhabitant of another state in which it transacts some business.[50] This distinction does not appear to have been presented or con-

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many purposes, its domicile in law is in the state of its creation (Shaw v. Quincy Mining Co. 145 U. S. 444; Seaboard Rice Milling Co. v. Chicago R. I. & P. Co., 270 U. S. 363), but it is living its life elsewhere. *In a very real and practical sense, it is a resident of the forum,* like the plaintiff in the Taylor case (266 U. S. 200, 207), who was *domiciled in one state and resided in another.*"

A foreign corporation having a permanent business situs in England is there considered a resident for purposes of jurisdiction and service (*Newby* v. *Von Oppen,* 1872, 7 Q. B. 293; *Haggin* v. *Comptoir D'Escompte de Paris,* 1889, 23 Q. B. Div. 519; *Lhoneux* v. *Hong Kong & Shanghai Banking Corp.,* 1886, 33 Ch. Div. 446; *La Bourgoyne,* 1899 App. Cas. 431; *Dunlop Pneumatic Tyre Co.* v. *Actien-Gesellschaft,* 1902, 1 K. B. 342; *Logan* v. *Bank of Scotland,* 1904, 2 K. B. 495).

[50] It was so held in *Dodge Mfg. Co.* v. *Patten* (C. C. A. 7, 1932) 60 F. (2d) 676, affirming (D. Ind. 1928) 23 F. (2d) 852, on all fours with the case at bar. There the corporation was incorporated in Delaware and had a nominal office there, but had its factory and executive office in Indiana. The Court held that the corporation was an inhabitant of Indiana within the meaning of the venue provision; that the principles announced by Justice HARLAN in *U. S.* v. *Southern Pacific R. Co., supra,* were applicable; and that the decisions of this Court cited above were not inconsistent with such holding.

sidered in any of the cases in this Court and in the lower courts following the *Shaw* case, cited in respondent's brief in opposition to the petition for a writ of certiorari herein.

Such a holding would better conform to the recognized purpose of the venue provision, to permit a corporation to be sued where it does its business and has its books, rather than to require it to take its books and its evidence to a distant place.[51] It will require a corporation to answer suit in the federal courts in the district where it can most conveniently defend or where, if doing business, it can be most conveniently sued by the plaintiff. The venue statute will thus be made effective as to corporations in the manner explicitly provided by Congress with respect to natural

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[51] The purpose of the venue provision in amended form as embodied in § 51 of the Judicial Act was stated in *General Investment Co.* v. *Lake Shore & M. S. R. Co., supra* (260 U. S. p. 275)

> "to save defendants from inconvenience to which they might be subject if they could be compelled to answer in any district, or wherever found."

And in *Ex parte Moore, supra,* the Court (209 U. S. 490, 502) discussing the nature and purposes of the venue provision, cited as applicable by analogy the following from the opinion on "a kindred question" in *First National Bank* v. *Morgan* (1889) 132 U. S. 141, 145:

> "This exemption of national banking associations from suits in state courts, established elsewhere than in the county or city in which such associations were located, was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process * * *"

persons, and a corporation will not be permitted, as has respondent here, to avoid suit in the district where it does most of its business and to compel those whose property has been affected by the doing of that business to seek it in a distant district chosen by it for paper incorporation.

Conclusion

The importance of jurisdiction in diversity cases over the increasing number of corporations having a nominal incorporation in one state and their real business situs in another presents a situation calling, we submit, for direct consideration by this Court.

The theory expressed by Chief Justice TANEY one hundred years ago in *Bank of Augusta* v. *Earle* that a corporation cannot exist outside of the state of its incorporation, rigidly adhered to, would prevent respondent from being sued *in personam* in any court, state or federal, outside of Delaware, by any plaintiff, resident or non-resident, except by its consent. In that view, the designation under the New York statute was a consent to be sued, waiving the venue provision.

If, on the other hand, the Taney theory be recognized today for the fiction which it is, respondent must be recognized as an inhabitant of the Southern District of New York.

In either view, the decision below should be reversed, and respondent should be held suable by petitioners in that district.

Respectfully submitted,

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Counsel for Petitioners.

APPENDIX

NEW YORK GENERAL CORPORATION LAW

§ *210. Authorization of foreign corporations, other than moneyed corporations, to do business within the state.* A foreign corporation, other than a moneyed corporation, shall not do business in this state without having first obtained from the secretary of state a certificate of authority. To obtain such certificate, the corporation shall comply with the following conditions:

1. It shall present to the secretary of state a statement and designation in its corporate name, signed and acknowledged by its president, or a vice-president, or its secretary, treasurer, managing director or attorney in fact, which shall set forth the state or country of its incorporation, the place where its office within this state is to be located, and if such place be in a city, the location thereof by street and number or other particular description; the business which it proposes to do within this state, and a designation of the secretary of state as its agent upon whom all process in any action or proceedings against it may be served within this state.

2. Annexed to such statement and designation shall be a copy of its certificate of incorporation, duly certified by the public officer having custody of the original, or, if the corporation is created by a special law and has no certificate of incorporation, a duly certified copy of such law, and, if any such copy is in a foreign language, an English translation thereof verified by oath of the translator.

§ *213. Existing authority and designation continued.* Every corporation which, at the time this section takes effect, has authority to do business in the state pursuant to a certificate heretofore granted by the secretary of state,

shall continue to have such authority. The designation heretofore made by any such corporation of a person upon whom all process against it may be served within the state shall continue in full force and effect until the death, resignation or removal from the state of the person so designated or the filing of an amended statement and designation in accordance with section two hundred fourteen revoking such designation, and thereupon the secretary of state shall become the agent of the corporation upon whom all process in any action or proceeding against it may be served within the state.

§ 218 *Contracts of unauthorized corporation not enforceable.* A foreign corporation, other than a moneyed corporation, doing business in this state shall not maintain any action in this state upon any contract made by it in this state, unless before the making of such contract it shall have obtained a certificate of authority. This prohibition shall also apply to any successor in title of such foreign corporation and to any person claiming under such successor of such foreign corporation or under either of them.

§ 225. *Action against foreign corporation by another foreign corporation or non-resident.* An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract made within the state, or relating to property situated within the state, at the time of the making thereof.

2. Where it is brought to recover real property situated within the state, or a chattel, which is replevied within the state.

3. Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state.

4. Where a foreign corporation is doing business within the state.

Within the meaning of this section, a foreign corporation shall not include a corporation located in this state and created by or under the laws of the United States.[52]

PENNSYLVANIA LAWS OF 1873, NO. 3.

Section 13. No insurance company, not of this state, nor its agents, shall do business in this state until he has filed with the insurance commissioner of this state a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company served on the insurance commissioner, or the party designated by him, or the agent specified by said company to receive service of process for the said company, shall have the same effect as if served personally on the company within this state, and if such company should cease to maintain such agent in this state so designated, such process may thereafter be served on the insurance commissioner; but so long as any liability of the stipulating company to any resident of this state continues, such stipulation cannot be revoked or modified, except that a new one may be substituted, so as to require or dispense with the service at the office of said company within this state, and that such service of process according to this stipulation shall be sufficient per-

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[52] This final paragraph is the only provision not found in Code of Civil Procedure § 1780 in 1917 when respondent's designation was filed.

sonal service on the company. The term process includes any writ of summons, subpoena, or order, whereby any action, suit or proceedings shall be commenced, or which shall be issued in or upon any action, suit or proceedings brought in any court of this commonwealth having jurisdiction of the subject matter.

DELAWARE CORPORATION LAW

Sec. 32. Meeting of Stockholders; Where; Principal Office; Where; Resident Agent:—In all cases after the first meeting of the incorporators, where it is not otherwise provided by the by-laws, the meetings of the stockholders of every corporation shall be held at its principal office in this State. The stockholders and directors may, however, hold their meetings and have an office or offices outside of this State, if the by-laws so provide; and every corporation shall maintain a principal office or place of business in this State and shall have a resident agent, who may be either an individual or a corporation, resident of, or located in, this State, in charge thereof.

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Supreme Court of the United States

OCTOBER TERM, 1939

No. 38

NEIRBO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, ET AL.,

Petitioners,

vs.

BETHLEHEM SHIPBUILDING CORPORATION, LTD.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

LAURENCE ARNOLD TANZER,
ROBERT P. WEIL,
Counsel for Petitioners.

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I.

Despite respondent's efforts [1] (Respondent's brief, pp. 2, 3, 5) to becloud the state of the record showing its presence in the Southern District of New York and its absence

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[1] For instance, while the headquarters of its huge shipbuilding business is located at 25 Broadway, respondent misleadingly says at page 3 of its brief "that it has some office furniture and records in the Southern District of New York."

from the District of Delaware, we submit that the following considerations stand out:

1. Service of process was regular on its face.[2]

2. The subject-matter of the suit being within the court's jurisdiction, the marshal's return of service of process made out a prima facie case for the exercise of jurisdiction and the burden was on respondent to allege and prove facts to support its dilatory defense under the venue statute.[3]

3. Respondent offered no facts, instead relying on the proposition that as a matter of law, no corporation incorporated in Delaware could be an inhabitant of the Southern District of New York within the meaning of the venue statute (R. 49-50).

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[2] The supplemental subpoena (R. 47) authorized by the court (R. 7) was served on respondent by the marshal by delivering a copy personally (R. 48) to the designated agent at the designated office (R. 57, 77, 79, 81).

[3] The incidence of the burden of proof was clarified by the Rules of Civil Procedure, under which no allegation regarding the residence of the parties is necessary (Rule 8a) and which place the venue exemption among defenses in law or fact (Rule 12b[3]).

Petitioners' reply brief in the District Court, referred to by respondent at page 3 of its brief, was not served until five days after the argument. At the argument the record of fact was closed. Petitioners' affidavit (R. 54-55), asserting that respondent's main office is located at 25 Broadway in the Southern District of New York, was served on respondent pursuant to the requirement contained in its order to show cause (R. 50) three days before the return day (R. 49) of the order and two weeks before respondent's motion was argued (R. 2).

4. If that proposition of law is correct, which petitioners dispute, respondent's actual presence in the Southern District of New York and absence from Delaware is immaterial.

5. If that proposition of law is incorrect; then the following undisputed facts (R. 55) are decisive:

> At 25 Broadway, New York City, in the Southern District of New York, Bethlehem has a permanent office at which it regularly transacts its business; and Bethlehem is permanently present in the Southern District of New York for the conduct of its corporate business. In addition to being its chief business office, said office at 25 Broadway is in a factual sense the corporate domicile of Bethlehem, since at that place and at no other place, the Board of Directors of Bethlehem meet to conduct its business, the chief executive officers of the company have their permanent offices, and the chief books and records of a general corporate and business nature are kept.
>
> Bethlehem, in a factual sense, is not present in the State of Delaware. Its statutory office is a mere nominal one, consisting of a listing with the Corporation Trust Company. Bethlehem has no plants or other property of a substantial and permanent nature in Delaware.

Furthermore,

> Bethlehem since prior to the commencement of this suit has been the owner of substantial[4] drydock

[4] The balance sheet of United Shipyards, Inc. as of December 31, 1937, made a part of the bill by paragraph "59" (R. 35, 36) but inadvertently admitted from the transcript, shows a valuation for drydocks of $7,006,129.70 before depreciation.

properties in the waters of New York Harbor (R. 14, 15, 17, 43, 42, 32), within the jurisdictional limits of the Southern District of New York (Judicial Code 97, 28 U. S. C. A. 178). As the Circuit Court of Appeals stated (R. 86):

> "The action was originally brought by the appellants, who are citizens and residents of New Jersey, against United Shipyards, Inc., a New York corporation of which they are stockholders, to restrain the carrying out by the latter of a contract for the sale of *drydocks in the waters of New York Harbor* and other property to Bethlehem Shipbuilding Corporation, Ltd.,"[5]

II.

Respondent's argument does not meet petitioners' proposition that under the rule of *Bank of Augusta* v. *Earle*, reiterated time and again by this Court, a corporation can have no legal existence outside of the state in which it is incorporated and therefore cannot, without its consent, be sued *in personam* by any plaintiff on any cause of action in any court outside of that state, while if that doctrine is no longer authoritative, the *Shaw* case, expressly relying on *Bank of Augusta* v. *Earle* for its holding that a corporation can have no inhabitancy outside of the state of its incorporation, is no longer controlling, and the same must be true of the *Keasbey & Mattison*, *Macon Grocery* and *Seaboard Rice Milling* cases.

At page 26 of its brief, respondent asserts that a corporation incorporated in one state is subject to suit *in personam* in other states where it does business without its consent. No

[5] Emphasis in quotations added.

authority is offered for that statement and it is clearly inconsistent with *Lafayette Ins. Co.* v. *French* (1856) 18 How. 404, 407-408; *Railroad Co.* v. *Harris* (1871) 12 Wall. 65, 81; *Ex parte Schollenberger* (1878) 96 U. S. 369, 376-378; *St. Clair* v. *Cox* (1882) 106 U. S. 350, 356-357; *New England Mut. L. Ins. Co.* v. *Woodworth* (1884) 111 U. S. 138, 144-145 and *In re Louisville Underwriters* (1890) 134 U. S. 488, 493; as well as *Gibbs* v. *Queen Ins. Co.* (1875) 63 N. Y. 114, 128-129 and *Plimpton* v. *Bigelow* (1883) 93 N. Y. 592, 598-599. And while multiplying authorities (Respondent's brief, pp. 9-10) for the proposition that a corporation incorporated in one state which does business in another state does not thereby (and implicitly, without more) become an inhabitant of such other state, respondent nowhere denies that the decisions of this Court on that subject all rely for their reasoning on the *Shaw* case and that the *Shaw* case was directly based on *Bank of Augusta* v. *Earle*.

If the doctrine of *Bank of Augusta* v. *Earle* was considered authoritative in New York in 1892 when New York passed the statute under which respondent filed its designation in 1917, such designation, to be effective for the purpose intended by the Legislature, must be construed as a consent to be sued.[6] If on the other hand the doctrine is not authoritative, respondent's main headquarters in the Southern District of New York should, we submit, lead to a holding that respondent is an inhabitant of that district within the meaning of the venue statute. As pointed out in petitioners'

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[6] The language of the designation, stressed by respondent at page 29 of its brief, is to be read not alone, but with the statutes expressing the intention of the state in requiring its filing (*Bagdon* v. *Phila. & Reading Coal & Iron Co.* (1916) 217 N. Y. 432, 436-437; *Penn. Fire Ins. Co.* v. *Gold Issue*

main brief (pp. 45-53), the question presented by respondent, having nothing but a paper incorporation in Delaware and its main business situs in the district where sued, is a new one. In deciding that question this Court can give full effect to the facts and hold respondent an inhabitant of the Southern District of New York without modifying anything which has actually been held by this Court.

III.

Contrary to the claims at pages 9, 34 of respondent's brief, petitioners are not in effect contending for a judicial reenactment of the venue statute prior to the 1887 amendment, under which a defendant could be sued wherever he was found. If the doctrine of *Bank of Augusta* v. *Earle* is overruled, and respondent be held, on the plain facts, to be

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Mining & Milling Co. (1917) 243 U. S. 93, 95-96). As so read, this Court has recognized that the filing of a designation may constitute a consent to be sued although in terms merely naming a process agent. In *Mutual Reserve Fund L. Asso.* v. *Phelps* (1903) 190 U. S. 147, 158, this Court said with respect to a Kentucky statute requiring the designation of a process agent:

> "This and other kindred statutes enacted in various states indicate the purpose of the state that foreign corporations engaging in business within its limits shall submit controversies growing out of that business to its courts, and not compel a citizen having such a controversy to seek the state in which the corporation has its home for the purpose of enforcing his claims. *Many of those statutes simply provided that the foreign corporations should name some person or persons upon whom service of process could be made.*"

an inhabitant of the Southern District of New York, no question of legislative intent in enacting the 1887 amendment will be presented. Even respondent does not contend that in the 1887 amendment, Congress attempted to legislate with respect to the inhabitancy of corporations. A corporation like respondent, having no real activities or property in its state of origin, and its main business situs in a district of another state, will for venue purposes be deemed a resident of that district as well as of its state of incorporation.[7] If on the other hand that doctrine be maintained

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[7] In England, the rule is even broader, and a corporation having substantial activties in the country of its origin is held to be a resident of Great Britain if it has a permanent office there. See cases cited in petitioners' main brief, note 49 at p. 52. Cf. *Harr* v. *Pioneer Mechanical Corp.* (1933) 65 F. (2d) 332, 334, where the Second Circuit Court of Appeals refused to apply the rule against interfering in the internal affairs of a foreign corporation where the corporation was found to be

> "a Delaware corporation by legal creation, but in every real sense * * * of New York only, where all its business is done, all its property is located and all its records are kept."

Also *Hutchinson* v. *Chase & Gilbert* (1930) 45 F. (2d) 139, 140, where the same court said with respect to the traditional doctrine of personal jurisdiction:

> "Such a theory is not really apposite to a corporation, however conceived, and it is only by analogy that it can be used."

Referring to the real situs of a corporation, the court said (p. 141):

> "It is difficult, to us it seems impossible, to impute the idea of locality to a corporation, except by virtue of those acts which realize its purpose."

in force and personal jurisdiction over foreign corporations continue to be maintained on the fiction of consent, a consent to be sued elsewhere than in the state of its incorporation must operate as a waiver of the venue defense. Congress did not prevent suit from being brought in any district on waiver of venue restrictions. If it had wished to accomplish that result, it could have restricted the jurisdiction of the courts over the subject-matter. Corporations were not mentioned in the debates on the proposed change in the venue provision in the bills out of which the 1887 amendment developed.[8] Prior to that amendment, Congress had

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[8] In 1880, Mr. Culberson introduced in the 46th Congress H. R. 4219, the main provision of which was to abolish jurisdiction of the subject-matter of diversity suits between foreign corporations doing business in a state and citizens of that state. The provision of this bill regarding the venue of diversity suits was the same as that contained in the Act of Mar. 3, 1887. The venue clause was discussed at 10 Cong. Rec. 700, 703, 814, 820. See also *id.* 1014. The bill passed the House (*id.* 1304-1305) but never emerged from the Senate Judiciary Committee. Similar bills passed the House in the 47th and 48th Congresses (respectively, H. R. 3123, 13 Cong. Rec. 427, 1754, 14 Cong. Rec. 904, 924, 1244-1255 and H. R. 1578, 15 Cong. Rec. 118, 896, 4879, *id.* appendix, 276, 286, 360) and met a similar fate in the Senate. H. R. 2441 in the 49th Congress was another similar bill. It passed the House (18 Cong. Rec. 613-614) and was reported by the Senate Judiciary Committee (*id.* 2168). The Senate adopted the House provision requiring diversity suits to be brought in the district of the residence of the plaintiff or defendant; required other suits to be brought only in the district of the defendant's inhabitance, striking out "or in which he shall be found"; and struck out the provision preventing the exercise of diversity jurisdiction over litigation between a foreign corporation and a citizen

given extensive consideration to curtailing litigation in the federal courts affecting foreign corporations.[9] But the proponents of such proposals sought unsuccessfully, by limiting jurisdiction of the subject-matter, to prevent a foreign corporation doing business in a state from removing suits by citizens thereof to the often distant, expensive and congested federal court, and to prevent such corporations from suing citizens of that state in the federal court on the ground of diversity of citizenship.[10] As the bill finally passed, it did not affect the situation presented by the

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of a state where it did business (*id* 2542-2546) On the report of a conference committee, the House receded and the Senate modification was accepted (*id.* 2651, 2727), the result being the Act of Mar. 3, 1887. Senator Hoar explained the venue change as follows (*id.* 2545):

> "• • • the proposed change in the law is that he can only sue him, they being citizens of different states, either in the defendant's state or if the defendant happens to be in the district of the plaintiff's home then in the plaintiff's district.
>
> "So instead of the sixty or seventy districts which by the existing law the plaintiff can sue him in there are only two left. Suppose the defendant goes to the plaintiff's home and is found there, a man doing business there, the plaintiff can sue him in the state court and the defendant can take him into the United States court. It is certainly reasonable that the plaintiff should be permitted in the first instance to take him into the United States Court."

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[9] See Frankfurter & Landis, "The Business of the Supreme Court," pp. 65, 68-69, 80-81.

[10] 15 Cong. Rec. appendix 287, 362, 363; 10 Cong. Rec. 700, 702, 723, 725, 814, 818, 819, 950, 1015; 14 Cong. Rec. 1245, 1247, 1249, 1251.

Schollenberger case, where citizens of Pennsylvania commenced suit against foreign corporations in a federal court in Pennsylvania. That suit could equally have been maintained under the present venue statute as under the Act of 1875, and the question decided in the *Schollenberger* case was the same question here presented, *viz.*, whether the venue restriction has been waived.

IV.

Respondent's contention (pp. 24, 25, 28, 29) that the New York statute, if interpreted as requiring a consent to be sued in the local courts, federal as well as state, would be unconstitutional under the ruling in the *Denton* case, is, we submit, without foundation. In the *Denton* case this Court held void the requirement of a Texas statute requiring a foreign corporation, as a condition of being permitted to do business in Texas, to agree not to remove any suit against it to a federal court. That holding rested upon the authority of *Home Ins. Co.* v. *Morse* (1874) 21 Wall. 445, and *Barron* v. *Burnside* (1887) 121 U. S. 186, which held a stipulation waiving the right of removal void because it tended to oust the courts of jurisdiction and because it was an attempt by state legislation to deprive the corporation of a right guaranteed to it by the federal constitution (cf. *Terral* v. *Burke Construction Co.* (1922) 257 U. S. 529, 532; *Phillips Petroleum Co.* v. *Jenkins* (1936) 297 U. S. 629, 634).

The present requirement of a waiver of a right to object to being sued in a district outside of the corporation's state of origin does not oust the courts of jurisdiction, but prevents their being ousted of jurisdiction, and does not waive any right given by the constitution. There is no constitutional right not to be sued in a district outside of a corpora-

tion's state of origin. Congress might have authorized the service of process of the federal court in any district (*Toland* v. *Sprague* (1838) 12 Pet. 300, 328-329; *Continental Ill. Nat. Bank & T. Co.* v. *Chicago, R. I. & Pac. Ry. Co.* (1935) 294 U. S. 648, 683); and did in fact by the original venue statute authorize defendants to be sued wherever found. The present venue restriction being merely a personal exemption which can be waived, a provision of state law requiring a corporation to waive it as a condition of being admitted to do business in the state, is not, as were the statutes requiring a waiver of the right of removal, "necessarily calculated to curtail the full exercise of the rights thus [by the constitution] secured." (*Terral* v. *Burke Construction Co., supra,* 257 U. S. pp. 532-533).

This Court has repeatedly held that an agreement to submit to the jurisdiction of the local courts is a reasonable and valid condition upon the admission of the corporation to do business in the state (*Ex parte Schollenberger, supra,* 96 U. S., p. 376; *Mutual Reserve Life Fund Asso.* v. *Phelps, supra,* 190 U. S., p. 158; *Washington ex rel. Bond & Goodwin & Tucker* v. *Superior Court* [11] (1933) 289 U. S. 361, 364, 365).

And Congress has shown that where the venue statute would exempt a corporation incorporated and conducting its main business in one state from suit in a federal court in another state where it does some business, the corporation may reasonably be required to waive that exemption

[11] In that case, this Court sustained a judgment based on service on the Secretary of State of Washington, where the defendant corporation had on file a process agent designation, although it had withdrawn from Washington and been dissolved three years before. This Court cited *Bank of Augusta* v. *Earle, Lafayette Ins. Co.* v. *French, St. Clair* v. *Cox,* and *Mutual Reserve Fund L. Asso.* v. *Phelps, supra.*

in advance. § 2 of the Act of Aug. 13, 1894, c. 282, 6 U. S. C. A. 7, requires a surety company incorporated in one state, desiring to give a bond for the completion of a federal improvement in another state, to designate a local process agent, thus waiving the venue defense and consenting to be sued in the district where the bond was given (*U. S.* v. *Sheridan* (C. C. Ky. 1902) 119 Fed. 236).

V.

The decision of the Circuit Court of Appeals should be reversed, and respondent should be held sueable by petitioners in the Southern District of New York.

Respectfully submitted,

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ROBERT P. WEIL,
Counsel for Petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1938

No. [redacted] 38

NEIRBO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, DENIS F. O'BRIEN and EMMA BOURKE,

Petitioners,

against

BETHLEHEM SHIPBUILDING CORPORATION, LTD.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

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Supreme Court of the United States

OCTOBER TERM, 1938

No. 913.

NEIRBO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, DENIS F. O'BRIEN and EMMA BOURKE,

Petitioners,

against

BETHLEHEM SHIPBUILDING CORPORATION, LTD.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

STATEMENT OF THE CASE

The only relevant fact in this case is that respondent is a Delaware corporation, and raised timely objection under §51 of the Judicial Code (28 U. S. C. 112) to the venue of a suit brought against it by New Jersey citizens and residents in the Southern District of New York solely on the ground of diversity of citizenship.[1]

[1] The statement of this Court, in *Burnrite Coal Co.* v. *Riggs*, 274 U. S. 208, at page 211, with respect to a suit in the New Jersey federal court, affords a model of brevity for a description of this case, as follows: "The plaintiff was a

The petitioners' statement of facts places emphasis upon the fact that the respondent is alleged to have property within the jurisdictional limits of the Southern District of New York. This would be irrelevant, if true. However, the record citations given by petitioners (all from their own bill of complaint) do not support the statement. See page 3 of their petition, at which there are references to R. 16 and R. 32 (at which we find only allegations relating to New York Harbor, which embraces both the Southern and Eastern Districts of New York[2]), R. 35 and R. 36 (at which we find no allegations even relating to the subject), and R. 43 (at which we find a reference to Staten Island, a part of the Eastern District of New York[2]). The facts are that the respondent had no plants in the Southern District of New York when this suit was commenced against it, although it did have plants in the Eastern District (Kings and Richmond Counties) and in other States, but that it had some office furniture in the Southern District of New York. Petitioners also refer to an affidavit made by their own attorney, entirely on information and belief, to the effect that respondent's principal office is in the Southern District of New York; but we did not answer this affidavit, as the point seemed irrelevant in view of the clear statutory mandate in §51 which confines venue to the residence of either the plaintiff or the defendant.

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citizen of New York; the defendant a Delaware corporation; the federal jurisdiction rested wholly on diversity of citizenship; and neither party was a citizen of New Jersey. Thus, there was a sound objection to the venue." If the words "New York" and "New Jersey" are transposed, and the reference to the plaintiff is made plural, the foregoing quotation precisely describes the case at bar.

[2]Judicial Code, § 97, 28 U. S. C. 178.

PETITIONERS' STATEMENT OF "QUESTIONS PRESENTED"

1. The question numbered "1" in the petition is in effect two questions, separated by the "and thereby" phrase. The first question,—whether "the local courts" will take jurisdiction of an action under certain circumstances,—is a question of local law, not of Federal law, and does not relate to the venue of suits in the Federal courts. As stated by the petitioners, it can obviously be answered "yes", without in any way affecting the question of Federal law presented after the "and thereby" phrase. In other words, the "question" preceding the "and thereby" phrase is unwarranted. The "question" following that phrase, if answered at all, must be answered in the negative. Submission by a foreign corporation to state court jurisdiction over its person, through qualifying to do business and designating an agent for the service of process, cannot constitute the waiver of a privilege explicitly accorded by Federal statutes to decline to be sued by non-residents in a United States court.

2. The facts do not justify the second question. It *assumes* that the respondent's "main business headquarters, its registered office, its designated agent and a substantial part of its properties are located" in the Southern District of New York. In fact, none of the defendant's properties, except office furniture, are located in the Southern District of New York. Also, there is no evidence, except an affidavit made on information and belief by petitioners' attorney, that the respondent's "main business headquarters" is in the Southern District of New York.

However, no substantial question would be presented even if the facts were correctly stated, for the reason that §51 of the Judicial Code in terms makes the test of venue dependent upon the state of residence and not upon facts of the character relied upon by the petitioners.

PETITIONERS' STATEMENT OF "REASONS RELIED ON FOR ALLOWANCE OF WRIT"

We refer to the petitioners' reasons in order:

(1) The decision below is not in conflict with that of the Tenth Circuit Court of Appeals in *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 100 F. (2d) 770 (1938), as the court there was careful to state that it was placing its decision on a special ground, *viz.*, its construction of certain Oklahoma statutes. Of course, we agree with the Second Circuit Court of Appeals that the distinction asserted by the Tenth Circuit Court of Appeals is unsound (R. 93); but we also agree with the Second Circuit Court of Appeals that the Tenth Circuit Court of Appeals believed that it was "recognizing the general rule" that "a mere designation of an agent to accept process is not a waiver of the venue privilege" afforded to foreign corporations by §51 of the Judicial Code, which was affirmed by this Court in *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 207-208.[3] We do not see that the language of the

[3] The cases in accord in the lower federal courts include: *McLean* v. *State of Mississippi*, 96 F. (2d) 741, cert. den. —— U. S. ——, 59 Sup. Ct. 84, 83 L. Ed. 20; *Heine Chimney Co.* v. *Rust Engineering Co.*, 12 F. (2d) 596 (C. C. A. 7th, 1926); *Beech-Nut Packing Co.* v. *P. Lorillard Co.*, 287 Fed.

Tenth Circuit Court of Appeals in 100 F. (2d) at page 774, can be read in any other way. Accordingly, the grant by this Court of the writ of certiorari in the *Oklahoma Packing* case does not call for a like grant in the present case, as the two Circuit Courts of Appeals are agreed on the fundamental principle, and the only question relating to venue which was properly presented in the petition for a writ of certiorari in that case was whether the Tenth Circuit Court of Appeals was correct in thinking that it had found a distinction specially applicable on the facts of that case.

2. The petitioners misconceive the holding of *Ex parte Schollenberger*, 96 U. S. 369. It was there held that foreign corporations which had designated an agent in Pennsylvania for the service of process against them were "found" in Pennsylvania, and could, therefore, be sued in that state under the then existing venue statute,[4] which established two alternative tests for venue, *viz.*, "residence" or being "found". When that statute was repealed in 1887, and the test of "residence" was established as the sole

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271 (S. D. N. Y., 1921); *Gray* v. *Reliance Life Ins. Co.*, 24 Fed. Supp. 144 (W. D. La., 1938); *Hamilton Watch Co.* v. *The George W. Borg Co.*, N. D. Ill. E. D., Mar. 16, 1939, Wilkerson, D.J. (Dept. of Justice, Decisions on Federal Rules of Civil Procedure, Bull. No. 23, p. 5, Apr. 3, 1939); *Standard Stoker Co.* v. *Lower*, 46 F. (2d) 678 (Md., 1931); *Thomas Kerfoot & Co.* v. *United Drug Co.*, 38 F. (2d) 671 (Del., 1930); *Jones* v. *Consolidated Wagon & Machine Co.*, 31 F. (2d) 383 (S. D. Idaho, 1929), appeal dismissed 280 U. S. 519; *Hagstoz* v. *Mutual Life Ins. Co. of New York*, 179 Fed. 569 (E. D. Penn., 1910); *Platt* v. *Massachusetts Real-Estate Co.*, 103 Fed. 705 (Mass., 1900).

[4]Act of March 3, 1875, c. 137, 18 Stat. at L. 470.

test,[5] the *Schollenberger* decision became wholly inapplicable, as this Court held in *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 207-208.[6]

The other cases cited by petitioners relate to an entirely different matter—whether personal jurisdiction of a foreign corporation is acquired by service on a designated agent in a suit on a claim arising outside the state. Whether the authority conferred by the designation is sufficiently broad in scope to extend to such a case may depend upon the law of the state; but whether the designation has the effect of waiving, for all time, the venue privilege expressly afforded by §51 of the Judicial Code, is a question on which there can obviously be no "state law", since the question can never arise in a state court action. The effect of such a designation must be, and has been, determined by the federal courts.[7]

3. The court below decided a question as to the venue of a suit in the District Court for the Southern District of New York. A decision on such a question *could not be* in

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[5]Act of March 3, 1887, c. 373, sec. 1, 24 Stat. at L. 552, as corrected by Act of August 13, 1888, c. 866, sec. 1, 25 Stat. at L. 433.

[6]This Court has recognized the intent of Congress in 1887 to restrict the jurisdiction of the federal courts by eliminating the "finding" of the defendant as one of the tests of venue (*Smith* v. *Lyons*, 133 U. S. 315, 319; *Galveston &c. Railway* v. *Gonzales*, 151 U. S. 496, 499; *Camp* v. *Gress*, 250 U. S. 308, 312); but the petitioners argue that now, 52 years later, that intent of Congress should be held abortive, in so far as foreign corporations are concerned.

[7]*Southern Pacific Co.* v. *Denton*, 146 U. S. 202, and the cases cited in footnote 3, *supra*.

conflict with any decision of a state court. Thus, the New York Court of Appeals in *Bagdon* v. *Philadelphia & Reading C. & I. Co.*, 217 N. Y. 432 (1916) only decided that service on a designated agent conferred on the state court jurisdiction to render a judgment *in personam* against a foreign corporation on a claim arising in another state. It held, with reference to the "contract" by which the agent was designated, that "The contract deals with jurisdiction of the person. It does not enlarge or diminish jurisdiction of the subject-matter. It means that whenever jurisdiction of the subject-matter is present, service on the agent shall give jurisdiction of the person" (217 N. Y. at p. 437). The case at bar involves neither jurisdiction of the subject-matter nor jurisdiction of the person—both of which admittedly exist here. The court below has held that the absence of a third requisite for an action in the District Court—proper venue under Judicial Code §51—presents an effective bar to the maintenance of this suit against the respondent.

4. In so far as the court below held that respondent could acquire no residence, within the meaning of Judicial Code §51, outside of the state of its incorporation (which was conceded by petitioners in the District Court), its decision may be contrary to one of the two grounds for the decision in *Dodge Mfg. Co.* v. *Patten*, 60 F. (2d) 676 (C. C. A. 7th, 1932). However, the "conflict" is not one which should lead to the granting of the writ, for two reasons:

(a) Since the *Dodge* decision, this Court has reaffirmed, in *International Milling Co.* v. *Columbia Co.*, 292

U. S. 511, 519,[8] the holding in numerous prior cases,[9] which the Seventh Circuit Court of Appeals failed to mention,[10] that a corporation has its residence in the state of its

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[8]The relevant statement from the opinion is quoted on page 14 of the petitioners' brief.

[9]*Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202; *In re Keasbey and Mattison Co.*, 160 U. S. 221; *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 215 U. S. 501; *Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357; *Seaboard Rice Milling Co.* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 363. See also *Ex parte Schollenberger*, 96 U. S. 369, 377; *Male* v. *Atchison &c. Ry.*, 240 U. S. 97; *General Inv. Co.* v. *Lake Shore Ry.*, 260 U. S. 261, 271; *Burnrite Coal Co.* v. *Riggs*, 274 U. S. 208, 211. Other cases in accord include: *Yanuszauckas* v. *Mallory S. S. Co.*, 232 Fed. 132 (C. C. A. 2d, 1916); *McLean* v. *State of Mississippi*, 96 F. (2d) 741 (C. C. A. 5th, 1938), cert. den. —— U. S. ——, 59 Sup. Ct. 84, 83 L. Ed. 20; *Central West Public Service Co.* v. *Craig*, 70 F. (2d) 427 (C. C. A. 8th, 1934); *De Dood* v. *Pullman Co.*, 53 F. (2d) 95 (E. D. N. Y., 1931), aff'd 57 F. (2d) 171 (C. C. A. 2d, 1932); *Beech-Nut Packing Co.* v. *P. Lorillard Co.*, 287 Fed. 271 (S. D. N. Y., 1921); *Gray* v. *Reliance Life Ins. Co.*, 24 Fed. Supp. 144 (W. D. La., 1938); *Standard Stoker Co.* v. *Lower*, 46 F. (2d) 678 (Md., 1931); *Thomas Kerfoot & Co.* v. *United Drug Co.*, 38 F. (2d) 671 (Del., 1930); *Jones* v. *Consolidated Wagon & Machine Co.*, 31 F. (2d) 383 (S. D. Idaho, 1929), appeal dismissed 280 U. S. 519; *Hagstoz* v. *Mutual Life Ins. Co. of New York*, 179 Fed. 569 (E. D. Penna., 1910). See also: *Hazeltine Corporation* v. *White*, 68 F. (2d) 715, 716 (C. C. A. 2d, 1934); *Automotive Equipment, Inc.* v. *Trico Products Corporation*, 10 Fed. Supp. 736, 738 (S. D. N. Y., 1935); *Brehm* v. *Delaware & H. R. Corporation*, 1 Fed. Supp. 217, 218 (S. D. N. Y., 1931); and *Fruit Industries, Ltd.* v. *Metro Glass Bottle Co.*, 18 Fed. Supp. 489, 492-493 (N. J., 1937).

[10]As the court below pointed out (R. 89), the opinion in the *Dodge* case was based upon a decision of Mr. Justice Harlan on circuit in *U. S.* v. *Southern Pacific R. R. Co.*, 49 Fed. 297 (N. D. Cal., 1892), but the Seventh Circuit Court of Appeals failed to note the later contrary decisions of this Court (footnote 9, *supra*), in several of which Mr. Justice

incorporation and in no other state, within the meaning of Judicial Code §51. Therefore, the "conflict" has already been resolved by this Court.

(b) The *Dodge* decision on the "residence" question has not been followed in any other circuit since its pronouncement almost seven years ago, although numerous cases have involved the same question (see footnote 9, *supra*); and recently a District Court in the same circuit has expressly refused to follow it. *Hamilton Watch Co.* v. *The George W. Borg Co.*, N. D. Ill. E. D., Mar. 16, 1939, Wilkerson, D.J. (Dept. of Justice, Decisions on Federal Rules of Civil Procedure, Bull. No. 23, p. 5, Apr. 3, 1939). Because the departure in the language of the *Dodge* opinion from the rule established by this Court is so apparent, that decision has not resulted in any confusion in the lower federal courts, and there is no need for this Court to again affirm the obvious proposition already so clearly established by its prior decisions.[11]

Harlan dissented (*Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 453; *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 215 U. S. 501, 511. *Cf. Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357).

[11]Explanation of the result reached in the *Dodge* case may perhaps be found in the fact that there had been a trial at which the defendant had established a right to a decision on the merits. Accordingly, no one but the plaintiff would have benefited from belated recognition of the defendant's venue objection. Since the defendant could have waived the objection, and undoubtedly would have waived it had it been apprised of the court's decision on the merits, the court naturally sought to avoid giving the plaintiff another bite at the apple as a result of the initial error in overruling the defendant's venue objection made in advance of trial (*Patten* v. *Dodge Mfg. Co.*, 23 F. (2d) 852 (D. C. Ind., 1928)).

5. The "residence" and "waiver" questions presented in this case were undoubtedly important at an earlier day, but they have long since been settled by decisions of this Court. The decisions on the "residence" question are collected in footnote 9, *supra*. *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, completely disposes of the "waiver" question. With reference to an argument identical with that now made by petitioners, that the designation of an agent by a foreign corporation is a waiver of all future venue objections under Judicial Code §51, this Court said (at pp. 207-208):

> "* * * the supposed agreement of the corporation went no further than to stipulate that process might be served on any officer or agent engaged in its business within the State. It did not undertake to declare the corporation to be a citizen of the State, nor (except by the vain attempt to prevent removals into the national courts) to alter the jurisdiction of any court as defined by law. The agreement, if valid, might subject the corporation, after due service on its agent, to the jurisdiction of any appropriate court of the State. *Lafayette Ins. Co.* v. *French*, 18 How. 404. It might likewise have subjected the corporation to the jurisdiction of a Circuit Court of the United States held within the State —so long as the Judiciary Acts of the United States allowed it to be sued in the district in which it was found. *Ex parte Schollenberger*, 96 U. S. 369; *New England Ins. Co.* v. *Woodworth*, 111 U. S. 138; *In re Louisville Underwriters*, 134 U. S. 488. But such an agreement could not, since Congress (as held in *Shaw* v. *Quincy Mining Co.* above cited) has made citizenship of the State, with residence in the district, the sole test of jurisdiction in this class

of cases, estop the corporation to set up non-compliance with that test, when sued in a Circuit Court of the United States."

Although there were two *alternative* reasons stated for that decision, the first of which is inapplicable to the present case, we agree with the statement of the Fifth Circuit Court of Appeals in *McLean* v. *State of Mississippi*, 96 F. (2d) 741, certiorari denied October 10, 1938, — U. S. —, 59 Sup. Ct. 84, 83 L. Ed. 20, that "we must consider the second reason, deliberately expounded with citation of authority, as the judgment of the Supreme Court that under the present federal statute appointment of an agent for service under a State statute so requiring does not imply an agreement to waive venue privileges in the courts of the United States."

CONCLUSION

A writ of certiorari should not be granted in this case.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 38

NEIRBO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, DENIS F. O'BRIEN and EMMA BOURKE,

Petitioners,

against

BETHLEHEM SHIPBUILDING CORPORATION, LTD.,

Respondent.

BRIEF FOR RESPONDENT

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IN THE

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NEIRBO COMPANY, THE A. P. SMITH MANUFACTURING COMPANY, DENIS F. O'BRIEN and EMMA BOURKE, *Petitioners,* *against* BETHLEHEM SHIPBUILDING CORPORATION, LTD., *Respondent.*	No. 38

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Circuit Court of Appeals, Second Circuit (per Clark, C. J.) is reported in 103 F. (2d) 765. The District Court's opinion has not been officially reported, but it appears at R. 5.

STATEMENT OF THE CASE

The only relevant fact in this case is that respondent is a Delaware corporation, and raised timely objection under § 51 of the Judicial Code (28 U. S. C. 112) to the venue of a suit brought against it by New Jersey citizens and residents in the Southern District of New York solely on the ground of diversity of citizenship.

The statement of this Court, in *Burnrite Coal Co.* v. *Riggs*, 274 U. S. 208, at page 211, with respect to a suit in the New Jersey federal court, affords a model of brevity for a description of this case, as follows:

> "The plaintiff was a citizen of New York; the defendant a Delaware corporation; the federal jurisdiction rested wholly on diversity of citizenship; and neither party was a citizen of New Jersey. Thus, there was a sound objection to the venue."

If the words "New York" and "New Jersey" are transposed, and the reference to the plaintiff is made plural, the foregoing quotation precisely describes the case at bar.

The petitioners' statement of the case, as well as their argument, places emphasis upon the alleged fact that the respondent has a substantial amount of its property within the jurisdictional limits of the Southern District of New York. This would be irrelevant, if true. However, the record citations given by petitioners (all from their own bill of complaint) do not support the statement.

At page 2 of their brief, petitioners refer to R. 16 and R. 32 (at which we find only allegations relating to New York Harbor, which embraces both the Southern and Eastern Districts of New York[1]), R. 35 and R. 36 (at which we find no allegations even relating to the subject), and R. 43 (at which we find a reference to Staten Island, to-wit Richmond County, a part of the Eastern District of New York[1]). The facts are that the respondent had no plants in the Southern District of New York when this suit was commenced against it, although it did have plants in the Eastern District (Kings and Richmond Counties) and in

[1]Judicial Code, § 97, 28 U. S. C. 178.

other states, but that it had some office furniture and records in the Southern District of New York.

All of the facts stated at page 3 of the petitioners' brief, except the reference to the respondent's state of incorporation, to the provisions of respondent's certificate of incorporation and to respondent's qualification to do business in New York, are taken from an affidavit made by their own attorney, entirely on information and belief, to the effect that respondent's principal office and "chief books and records" are in the Southern District of New York. We did not answer this affidavit, as the point seemed irrelevant in view of the clear statutory mandate in § 51 which confines venue, in cases where jurisdiction is founded only on diversity of citizenship, to the district of the residence of either the plaintiff or the defendant. In the District Court petitioners concurred in our view, for they expressly conceded that respondent did not have its "residence" in New York within the meaning of Judicial Code § 51.[2] Not until they reached the Circuit Court of Appeals did they make the argument now contained in Point II of their brief, (pp. 32-54), which is based entirely upon the statement of alleged facts made by their attorney on information and belief.

STATUTE INVOLVED

§ 51 of the Judicial Code (28 U. S. C. 112), so far as material, provides as follows:

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[2] In their reply brief in the District Court, the petitioners said "This [referring to their argument on the motion] involves no contradiction of Bethlehem's two propositions: * * * II. That 'Bethlehem is not a resident of the Southern District of New York within the meaning of section 51 of the Judicial Code.'"

"* * * no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

QUESTIONS PRESENTED

The questions presented are:

1. Was respondent, a Delaware corporation, and alleged in the bill to be a citizen and resident of Delaware (R. 10), a "resident" of the Southern District of New York when this action was commenced against it, within the meaning of Judicial Code § 51?

2. If the first question is answered in the negative, had respondent waived its right to object to the venue of this action, under Judicial Code § 51, because, in 1918, it had designated, pursuant to the laws of the State of New York, an agent to receive service of process against it?

For the sake of brevity, these two questions will be sometimes referred to hereinafter as the "residence" and "waiver" questions.

PETITIONERS' STATEMENT OF "QUESTIONS PRESENTED"

The petitioners' question numbered "1" is in effect two questions, separated by the "and thereby" phrase. The first

question,—whether "the local courts" will take jurisdiction of an action under certain circumstances,—is a question of local law, not of federal law, and does not relate to the venue of suits in the federal courts. As stated by the petitioners, it can obviously be answered "yes", without in any way affecting the question of federal law presented after the "and thereby" phrase. The "question" following that phrase must be answered in the negative. Submission by a foreign corporation to state court jurisdiction over its person, through qualifying to do business and designating an agent for the service of process, cannot constitute the waiver of a privilege explicitly accorded by federal statutes.

The petitioners' question numbered "2" is not justified by the facts. It *assumes* that the respondent's "main business headquarters, * * * and a substantial part of its properties are located" in the Southern District of New York. There is nothing in the record which supports the second *assumed* fact, and the *actual* fact is that *none* of the respondent's properties, except office furniture and some of its records, was located in the Southern District of New York when this suit was commenced against respondent. The only evidence as to the "main business headquarters" of respondent is found in an affidavit made on information and belief by petitioners' attorney. However, even if the facts assumed in this question were correctly stated, it would have to be answered in the negative, for the reason that Judicial Code § 51 in terms makes the test of venue dependent, not upon facts of the character relied upon by the petitioners, but upon the district of residence, which this Court has held, with respect to corporations, to mean a district in the state of incorporation.

SUMMARY OF ARGUMENT

The respondent stands upon two propositions: (1) it is not a "resident" of the Southern District of New York within the meaning of the Judicial Code § 51; and (2) it did not waive its right to object to the venue of this action. Both are firmly settled by decisions of this Court; and the substantial question in this case is whether this Court is to overrule them.

As to the first proposition, this Court has firmly established that, for the purpose of venue, a corporation's "residence" is in the state of its incorporation, *and in no other state*. *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202; *In re Keasbey and Mattison Co.*, 160 U. S. 221; *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 215 U. S. 501; *Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357; *Seaboard Rice Milling Co.* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 363; *Luckett* v. *Delpark, Inc.*, 270 U. S. 496. See also *Ex parte Schollenberger*, 96 U. S. 369, 377; *Western Loan Co.* v. *Butte & Boston Min. Co.*, 210 U. S. 368; *Male* v. *Atchison &c. Ry.*, 240 U. S. 97; *General Inv. Co.* v. *Lake Shore Ry.*, 260 U. S. 261, 271; *Burnrite Coal Co.* v. *Riggs*, 274 U. S. 208, 211; *International Milling Co.* v. *Columbia Co.*, 292 U. S. 511, 519.[3] The rule established by this Court affords

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[3]Cases in the lower federal courts to the same effect include: *Yanuszauckas* v. *Mallory S. S. Co.*, 232 Fed. 132 (C. C. A. 2d, 1916); *McLean* v. *State of Mississippi*, 96 F. (2d) 741 (C. C. A. 5th, 1938), cert. den. 305 U. S. 623, 59 Sup. Ct. 84, 83 L. Ed. 20; *Central West Public Service Co.* v. *Craig*, 70 F. (2d) 427 (C. C. A. 8th, 1934); *De Dood* v. *Pullman Co.*, 53 F. (2d) 95 (E. D. N. Y. 1931), aff'd 57 F. (2d) 171 (C. C. A. 2d, 1932); *Beech-Nut Packing Co.* v. *P. Lorillard Co.*, 287 Fed. 271 (S. D. N. Y., 1921); *Gray* v.

a clear and easily applied test for determining whether suits involving corporations are brought in the proper court, and it gives full effect to the purpose of Congress to restrict the jurisdiction of the federal courts, as evidenced by the repeal in 1887[4] of so much of the old venue statute[5] as permitted defendants to be sued wherever they might be "found" (see *Smith* v. *Lyons*, 133 U. S. 315, 319; *Galveston &c. Railway* v. *Gonzales*, 151 U. S. 496, 499; *Camp* v. *Gress*, 250 U. S. 308, 312). Petitioners present no persuasive reasons for substituting, for the simple rule so often adhered to by this Court, an indefinite test dependent upon variable factors such as the location of the corporation's books or business, or its convenience in defending the suit. Hence the petitioners were correct in the position that they took in their bill (R. 10) and in the District Court, viz., that respondent is a "citizen and resident of the State

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Reliance Life Ins. Co., 24 Fed. Supp. 144 (W. D. La., 1938); *Standard Stoker Co.* v. *Lower*, 46 F. (2d) 678 (Md., 1931); *Thomas Kerfoot & Co.* v. *United Drug Co.*, 38 F. (2d) 671 (Del., 1930); *Jones* v. *Consolidated Wagon & Machine Co.*, 31 F. (2d) 383 (S. D. Idaho, 1929), appeal dismissed 280 U. S. 519; *Hagstoz* v. *Mutual Life Ins. Co. of New York*, 179 Fed. 569 (E. D. Penna., 1910). See also: *Hazeltine Corporation* v. *White*, 68 F. (2d) 715, 716 (C. C. A. 2d, 1934); *Toulmin* v. *James Mfg. Co.*, 27 Fed. Supp. 512 (W. D. N. Y., 1939); *Automotive Equipment, Inc.* v. *Trico Products Corporation*, 10 Fed. Supp. 736, 738 (S. D. N. Y., 1935); *Brehm* v. *Delaware & H. R. Corporation*, 1 Fed. Supp. 217, 218 (S. D. N. Y., 1931); and *Fruit Industries, Ltd.* v. *Metro Glass Bottle Co.*, 18 Fed. Supp. 489, 492-493 (N. J., 1937).

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[4]Act of March 3, 1887, c. 373, sec. 1, 24 Stat. at L. 552, as corrected by Act of August 13, 1888, c. 866, sec. 1, 25 Stat. at L. 433.

[5]Act of March 3, 1875, c. 137, 18 Stat. at L. 470.

of Delaware"; and they are wrong in their later shift to the position that respondent is a "resident" of the Southern District of New York.

The proposition that the appointment by a foreign corporation of an agent to receive service of process against it does not constitute a waiver of the federal statutory right to contest improper venue, has likewise been established by decision of this Court, *Southern Pacific Co.* v. *Denton*, 146 U. S. 202.[6] The petitioners in effect argue that that decision should be reconsidered and overruled; their argument is based upon their interpretation (1) of the legislative history of the New York statute, and (2) of the opinion of this Court in *Ex parte Schollenberger*, 96 U. S. 369. We believe both interpretations to be erroneous and strained, and the first to be irrelevant. The New York statute cannot affect the federal privilege; nor indeed does it purport so to do. The *Schollenberger* decision was based upon the prior statute which expressly extended venue to include any state

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[6] The principle of the *Denton* case has been applied by the lower federal courts in the following cases: *McLean* v. *State of Mississippi*, 96 F. (2d) 741, cert. den. 305 U. S. 623, 59 Sup. Ct. 84, 83 L. Ed. 20; *Heine Chimney Co.* v. *Rust Engineering Co.*, 12 F. (2d) 596 (C. C. A. 7th, 1926); *Toulmin* v. *James Mfg. Co.*, 27 Fed. Supp. 512 (W. D. N. Y., 1939); *Beech-Nut Packing Co.* v. *P. Lorillard Co.*, 287 Fed. 271 (S. D. N. Y., 1921); *Gray* v. *Reliance Life Ins. Co.*, 24 Fed. Supp. 144 (W. D. La., 1938); *Hamilton Watch Co.* v. *George W. Borg Co.*, 27 Fed. Supp. 215 (N. D., Ill. 1939); *Standard Stoker Co.* v. *Lower*, 46 F. (2d) 678 (Md., 1931); *Thomas Kerfoot & Co.* v. *United Drug Co.*, 38 F. (2d) 671 (Del., 1930); *Jones* v. *Consolidated Wagon & Machine Co.*, 31 F. (2d) 383 (S. D. Idaho, 1929), appeal dismissed 280 U. S. 519; *Hagstoz* v. *Mutual Life Ins. Co. of New York*, 179 Fed. 569 (E. D. Penn., 1910); *Platt* v. *Massachusetts Real-Estate Co.*, 103 Fed. 705 (Mass., 1900).

where the defendant could be "found". The petitioners are in effect contending for judicial reenactment of the old venue statute, which was applied to foreign corporations in the *Schollenberger* case, but which was repealed by the Congress in 1887.

ARGUMENT

POINT I.

RESPONDENT IS NOT A "RESIDENT" OF THE SOUTHERN DISTRICT OF NEW YORK WITHIN THE MEANING OF JUDICIAL CODE, § 51.

1. The decisions of this Court firmly establish the proposition that, for the purpose of venue, a corporation has its "residence" in the state of its incorporation, and in no other state.

In *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, this Court held:

> "* * * that under the existing Act of Congress [now Judicial Code, § 51] a corporation, incorporated in one state only, cannot be compelled to answer, in a Circuit Court of the United States held in another State in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different State" (145 U. S. at p. 453).

This proposition has been reaffirmed in an unbroken line of decisions of this Court, including *Southern Pacific*

Co. v. *Denton*, 146 U. S. 202; *In re Keasbey and Mattison Co.*, 160 U. S. 221; *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 215 U. S. 501; *Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357; *Seaboard Rice Milling Co.* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 363; *Luckett* v. *Delpark, Inc.*, 270 U. S. 496. See also *Ex parte Schollenberger*, 96 U. S. 369, 377; *Western Loan Co.* v. *Butte & Boston Min. Co.*, 210 U. S. 368; *Male* v. *Atchison &c. Ry.*, 240 U. S. 97; *General Inv. Co.* v. *Lake Shore Ry.*, 260 U. S. 261, 271; *Burnrite Coal Co.* v. *Riggs*, 274 U. S. 208, 211; *International Milling Co.* v. *Columbia Co.*, 292 U. S. 511, 519. It has likewise been applied by the lower federal courts in many cases, including *Yanuszauckas* v. *Mallory S. S. Co.*, 232 Fed. 132 (C. C. A. 2d, 1916); *McLean* v. *State of Mississippi*, 96 F. (2d) 741 (C. C. A. 5th, 1938), cert. den. 305 U. S. 623, 59 Sup. Ct. 84, 83 L. Ed. 20; *Central West Public Service Co.* v. *Craig*, 70 F. (2d) 427 (C. C. A. 8th, 1934); *De Dood* v. *Pullman Co.*, 53 F. (2d) 95 (E. D. N. Y., 1931); aff'd 57 F. (2d) 171 (C. C. A. 2d, 1932); *Beech-Nut Packing Co.* v. *P. Lorillard Co.*, 287 Fed. 271 (S. D. N. Y., 1921); *Gray* v. *Reliance Life Ins. Co.*, 24 Fed. Supp. 144 (W. D. La., 1938); *Standard Stoker Co.* v. *Lower*, 46 F. (2d) 678 (Md., 1931); *Thomas Kerfoot & Co.* v. *United Drug Co.*, 38 F. (2d) 671 (Del., 1930); *Jones* v. *Consolidated Wagon & Machine Co.*, 31 F. (2d) 383 (S. D. Idaho, 1929), appeal dismissed 280 U. S. 519; *Hagstotz* v. *Mutual Life Ins. Co. of New York*, 179 Fed. 569 (E. D. Penna., 1910). See also: *Hazeltine Corporation* v. *White*, 68 F. (2d) 715, 716 (C. C. A. 2d, 1934); *Toulmin* v. *James Mfg. Co.*, 27 Fed. Supp. 512 (W. D. N. Y., 1939); *Automotive Equipment, Inc.* v. *Trico Products Corporation*, 10 Fed. Supp. 736, 738 (S. D. N. Y.,

1935); *Brehm* v. *Delaware & H. R. Corporation*, 1 Fed. Supp. 217, 218 (S. D. N. Y., 1931) and *Fruit Industries, Ltd.* v. *Metro Glass Bottle Co.*, 18 Fed. Supp. 489, 492-493 (N. J., 1937).

This brief would be unduly lengthened if we attempted to discuss all of the decisions of this Court in which the principle is stated and applied. We will, therefore, refer only to one of the more recent decisions on the point, in which this Court not only reaffirmed the principle but also refused to hear argument to the contrary. *Seaboard Rice Milling Company* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 363. An action at law to recover damages for negligence was brought in the Eastern District of Missouri by a Texas corporation against a railroad corporation organized under the laws of Illinois and Iowa. The defendant maintained a branch office and operated a branch line of its railroad within the Eastern District of Missouri. The defendant appeared specially and filed a plea to the jurisdiction on the ground that neither it nor the plaintiff was a resident or inhabitant of the District. The District Court sustained the plea and dismissed the suit for want of jurisdiction, and a direct writ of error was allowed on the jurisdictional question. The defendant then made a motion in this Court to affirm the judgment below, upon the ground that the question raised with respect to the decision below was so unsubstantial as not to need further argument. The motion was granted and the decision of the District Court was affirmed by this Court without further argument. In its opinion, this Court said (270 U. S. at p. 366):

> "It is immaterial whether the general federal jurisdiction in the present suit is founded upon

diversity of citizenship alone, or whether the suit is also one arising under the laws of the United States, since neither the Milling Company nor the Railway Company is a resident of the Eastern District of Missouri; *a corporation being, within the meaning of the jurisdictional statutes, a resident of the State in which it is incorporated, and not a resident or inhabitant of any other State, although it may be engaged in business within such other State.* * * *" (Italics added.)

In so far as we know, there is only one recent decision which questions the principle. In *Dodge Mfg. Co.* v. *Patten*, 60 F. (2d) 676 (1932), the Seventh Circuit Court of Appeals held that a Delaware corporation had acquired a residence in Indiana for the purpose of venue. As the Court below pointed out (R. 89), that decision was based entirely upon a decision of Mr. Justice Harlan on circuit in *U. S.* v. *Southern Pacific R. R. Co.*, 49 Fed. 297 (N. D. Cal., 1892), and the Seventh Circuit Court of Appeals failed to note the later contrary decisions of this Court cited above, in several of which Mr. Justice Harlan dissented (*Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 453; *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 215 U. S. 501, 511. *Cf. Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357). The *Dodge* decision has never been followed in any other circuit and recently a district court in the same circuit has refused to follow it. *Hamilton Watch Co.* v. *George W. Borg Co.*, 27 Fed. Supp. 215 (N. D. Ill., 1939).

Explanation of the result reached in the *Dodge* case may perhaps be found in the fact that there had been a trial at which the defendant had established a right to a decision on the merits. Accordingly, no one but the plaintiff would

have benefited from belated recognition of the defendant's venue objection. Since the defendant could have waived the objection, and undoubtedly would have waived it had it been apprised of the court's decision on the merits, the court naturally sought to avoid giving the plaintiff another bite at the apple as a result of the initial error in overruling the defendant's venue objection made in advance of trial (*Patten* v. *Dodge Mfg. Co.*, 23 F. (2d) 852 (D. C. Ind., 1928)).

2. The rule established by this Court affords a clear and easily applied test for determining whether suits involving corporations are brought in the proper district.

Petitioners in their brief (p. 41) recognize the desirability of a simple criterion for determining questions of jurisdiction involving corporations. Thus, they approve the principle established by this Court that a corporation is a citizen only of its state of incorporation, and of no other state, for the purpose of determining diversity of citizenship questions. Certainly there are equally strong reasons for a simple criterion for determining questions of venue. As Judge Clark said, in his opinion for the court below in the present case (R. 89):

> "Indeed, so long as the citizenship of a corporation for jurisdictional purposes is determined by the state of its incorporation, there would seem no good reason for a different view of the venue requirements. The limitation of suits against a corporation implicit in the rule as to jurisdiction would be of comparatively little effect if all plaintiffs who lived outside the state of incorporation could sue

the corporation at will wherever it carried on business."

The petitioners contend that there should be a departure from the simple and readily applied test for determining the residence of corporations for the purpose of venue to which this Court has adhered, and that instead, the residence of a corporation should be determined in each case upon a weighing of various indefinite and variable factors, such as the location of the corporation's books and "evidence" [*sic*, Petitioners' brief, p. 53], the convenience with which it could defend the action, the convenience of the plaintiffs who seek to sue it, and finally, whether the business which the corporation transacts in the state is "substantial".

The petitioners refer to the "recognized purpose of the venue provision, to permit a corporation to be sued where it does its business and has its books, rather than to require it to take its books and its evidence to a distant place" (Petitioners' brief, p. 53). Of course, that is not the purpose of the venue provision. The venue provision limits the jurisdiction of suits to the home of the defendant (or the home of the plaintiff in diversity of citizenship cases). It is no concern of the courts or of Congress if defendants choose to take their books or their evidence away from their home, with knowledge that they may be called upon to defend suits at their home.

Another virtue which the petitioners claim for their rule is that "it will require a corporation to answer suit in the federal courts in the district where it can most conveniently defend or where, if doing business, it can be most conveniently sued by the plaintiff" (Petitioners' brief,

p. 53). As to the corporation's convenience, the answer is obvious. If a corporation is sued outside the state of its incorporation in a place where it can conveniently defend the suit, it can simply waive the venue requirement and permit the suit to proceed against it.

As to the plaintiff's convenience, the answer is equally obvious. Certainly we know of no authority, and petitioners have referred to none, establishing a vested right in plaintiffs to bring suits in the most convenient federal courts, particularly where, as here, the federal court of the plaintiffs' choice is across the street from a state court which can give complete relief to the plaintiffs.

The practical difficulties with the petitioners' test are apparent. If there were once a departure from the simple criterion of corporate residence heretofore applied by the courts, practically every suit in the federal courts involving foreign corporations would, at the very outset, involve useless and expensive controversies as to whether the venue could be legally established.

3. The rule established by this Court gives full effect to the intention of Congress to restrict the jurisdiction of the federal courts.

Prior to 1887, the federal venue statute provided that corporations, and other defendants, could be sued wherever they were "found".[1]

This Court held in *Ex parte Schollenberger*, 96 U. S. 369, that a corporation was "found" in any state where it had qualified to do business as a foreign corporation and

[1] Act of March 3, 1875, c. 137, 18 Stat. at L. 470.

appointed an agent for the service of process upon it, although at the same time it reaffirmed the principle that "a corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter * * *" (96 U. S. at p. 377). The result of this decision was, of course, that corporations could be sued in any district where they were *legally* doing business, even though none of the parties resided in the district.

In 1887 Congress repealed this venue statute,[8] and provided that the venue of suits based upon diversity of citizenship should be limited to districts where either the plaintiffs or the defendants resided.

This Court has recognized that the purpose of Congress in enacting the 1887 legislation was to restrict the jurisdiction of the federal courts. See *Smith* v. *Lyons,* 133 U. S. 315, 319; *Galveston &c. Railway Co.* v. *Gonzales,* 151 U. S. 496, 499; *Camp* v. *Gress,* 250 U. S. 308, 312.

Nor is there any apparent reason why that healthy trend should be reversed, and why this Court should now overrule its established construction of the venue statute so as to open up the federal courts to increased litigation. Yet, the petitioners, by giving a new interpretation to the residence requirement of the venue statute, would go even beyond the old statute, for they seek a rule that a corporation could be sued not only where it legally did business, but also wherever it could conveniently defend or wherever the plaintiffs could conveniently sue or wherever the corpora-

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[8]Act of March 3, 1887, c. 373, Sec. 1, 24 Stat. at L. 552, as corrected by Act of August 13, 1888, c. 866, Sec. 1, 25 Stat. at L. 433.

tion's books or "evidence" was located. We submit that their argument completely disregards the Congressional intent in the 1887 enactment and that the clear purpose of Congress in changing the venue statute is given full effect by the rule established by this Court.

4. Petitioners have presented no persuasive reasons justifying a departure from the rule established by this Court, and applied by the Court below, for determining the residence of corporations for the purpose of venue.

The burden of petitioners' arguments is that the prior decisions of this Court are all distinguishable, or that they were wrongly decided. On these points, we prefer to rest on the able opinion of the Court below (R. 87-90).

Inasmuch as the petitioners' criticisms of, and glosses on, the settled opinions of this Court appear to us to be hypertechnical, we cannot answer them in detail without ourselves appearing hypertechnical. But as the argument has been made, we answer it "in kind".

(a) We cannot find the expression of doubt seen by the petitioners in the opinion in *Camp* v. *Gress*, 250 U. S. 308, at p. 312, as to the soundness of the decision in *Shaw* v. *Quincy Mining Co.*, 145 U. S. 144 (Petitioners' brief, p. 47, footnote 48).

(b) The petitioners intimate that the *Shaw* decision and the cases following it are inconsistent with certain other cases involving entirely different questions. Thus, they cite *Picquet* v. *Swan*, 5 Mason 35, Fed. Cas. #11134 (C. C. Mass., 1828) and *Toland* v. *Sprague*, 12 Pet. 300, both

of which involved the venue of suits against individuals[9]; *Galveston &c. Ry. Co.* v. *Gonzales*, 151 U. S. 496, which determined that a corporation incorporated in a state containing more than one district could be a resident of only one of such districts; and cases dealing with the sufficiency of jurisdictional allegations of citizenship in complaints. Obviously, the inconsistency suggested by petitioners does not exist.

(c) The petitioners devote an extended discussion to the thesis that the decisions prior to the *Shaw* case foreshadowed a different result (Petitioners' brief, pp. 42-45). Whether the thesis is right or wrong, it certainly is wholly immaterial.

(d) The petitioners attempt to distinguish the *Shaw* case, and the decisions following it, on the ground that the rule there stated was broader than was required for the decisions. The fallacy of their attempted distinction is illustrated if we compare the statement of this Court in the *Shaw* case

> "* * * that under the existing Act of Congress a corporation incorporated in one State only, cannot be compelled to answer, in a Circuit Court of the United States held in another State in which it has a usual place of business, to a civil suit at law or in equity brought by a citizen of a different State"

with the paraphrase of that sentence in the petitioners' brief (p. 49):

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[9]The language in *Picquet* v. *Swan* and *Toland* v. *Sprague* to which petitioners apparently refer, dealing with the distinction between the words "citizenship" and "residence" for the purpose of venue, was only *dictum*, since in neither case did it appear that the defendant was a citizen of the State in which suit was brought.

> "* * * that a corporation incorporated in one state and transacting its business there does not become an inhabitant of another state merely by there transacting a portion of its business through agents appointed by it for that purpose."

Thus, the petitioners interpret the decision in the *Shaw* case as a holding that a corporation does not become an inhabitant of another state *merely* by doing business there, as if the presence of other factors, in addition to the mere doing of business, might change the result; whereas the decision actually was that a corporation cannot be sued outside of its state of incorporation by non-residents *even though* it does business in another state.

(e) The petitioners criticize this Court for having said in the *Shaw* case that "The word 'inhabitant', in that act [the venue provision in the Judiciary Act of 1789[10]], was apparently used, not in any larger meaning than 'citizen', but to avoid the incongruity of speaking of a citizen of anything less than a State, when the intention was to cover not only a district which included a whole State, but also two districts in one State, * * *" (145 U. S. at p. 447). But the reasoning of this Court as to the meaning of the word "inhabitant" appears to us to have been good sound sense, and in any event it has become the settled interpretation of the statute.

(f) The petitioners further suggest, at p. 34 of their brief, that the coupling, in the original venue statute, of the test of "finding" with the test of "inhabitancy" indicated that Congress thought of the "finding" as being of the same nature or quality as the habitation. The language

[10]Act of September 24, 1789, § 11, 1 Stat. at L. 79.

does not appear to us, as it did not appear to this Court, to compel any such conclusion. The two thoughts were obviously contesting,—the one of where the corporation was "at home"—its habitation,—the other of where it might temporarily be found.

(g) Finally, the petitioners suggest that further evidence of an erroneous interpretation by this Court in the *Shaw* case is found in the fact that the venue clause supplemented a provision that "no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court" (Petitioners' brief, pp. 34-38). In their discussion following this statement, which is meaningless by itself, they state that the venue provision was adopted *because* Congress had placed territorial limits upon the process of the Circuit Courts, and that the purpose of the original venue provision was to protect parties from being sued in districts distant from their homes. If this was the purpose of Congress in enacting the original venue statute, it certainly failed to carry it out, since it permitted suits wherever the defendant could be "found", even though the presence of the defendant within the district might be of the most temporary character. Obviously, it was not until the 1887 repeal of the "finding" provision that Congress evidenced an intent to protect parties from being sued in districts distant from their legal homes. Whatever argument it is that petitioners are trying to make at this point (the nature of which we must confess is not clear to us), is based upon a misunderstanding of the purpose of the original venue statute and upon a confusion between the concept of jurisdiction over the person and the concept of venue.

POINT II.

RESPONDENT DID NOT WAIVE ITS RIGHT TO OBJECT TO THE VENUE OF THIS ACTION WHEN, IN 1918, IT QUALIFIED TO DO BUSINESS IN NEW YORK AS A FOREIGN CORPORATION AND DESIGNATED AN AGENT TO RECEIVE SERVICE OF PROCESS AGAINST IT.

Since neither any of the petitioners nor the respondent is a resident of New York, the decision below must be affirmed unless respondent has waived its right to object to the venue of the action. At the outset there are several matters relating to the waiver question about which there is no dispute here.

1. Respondent's right to object to suit against it in the Southern District of New York by the non-resident petitioners is a personal privilege provided by Judicial Code § 51, which may be waived (Petitioners' brief, pp. 7-10);

2. The petitioners' waiver argument is based entirely upon the appointment by respondent of an agent to receive service of process against it, and not upon the fact that respondent does business in the Southern District of New York; and

3. Respondent has not waived the privilege by any action or any failure to act, since the commencement of this action.

The precise question remaining is whether respondent's designation of an agent to receive service of process, when

it qualified to do business in New York in 1918, was a waiver for all time of its right to make venue objections under Judicial Code § 51. Respondent denies that the designation had any such effect.

1. In *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, this Court held that the appointment by a foreign corporation of an agent to receive service of process against it does not constitute a waiver of the corporation's right to object to the venue of suits not brought in compliance with Judicial Code, § 51.

The precise point on which petitioners' waiver argument is based was squarely decided adversely to petitioners and favorably to respondent in *Southern Pacific Company* v. *Denton*, 146 U. S. 202.[11] In that case a resident of the Eastern District of Texas sued a Kentucky corporation in the Western District of Texas for damages resulting from the defendant's negligence in the latter District. The

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[11]The same principle has been applied by the lower federal courts in the following cases: *McLean* v. *State of Mississippi*, 96 F. (2d) 741, cert. den. 305 U. S. 623, 59 Sup. Ct. 84, 83 L. Ed. 20; *Heine Chimney Co.* v. *Rust Engineering Co.*, 12 F. (2d) 596 (C. C. A. 7th, 1926); *Toulmin* v. *James Mfg. Co.*, 27 Fed. Supp. 512 (W. D. N. Y., 1939); *Beech-Nut Packing Co.* v. *P. Lorillard Co.*, 287 Fed. 271 (S. D. N. Y., 1921); *Gray* v. *Reliance Life Ins. Co.*, 24 Fed. Supp. 144 (W. D. La., 1938); *Hamilton Watch Co.* v. *George W. Borg Co.*, 27 Fed. Supp. 215 (N. D., Ill. 1939); *Standard Stoker Co.* v. *Lower*, 46 F. (2d) 678 (Md., 1931); *Thomas Kerfoot & Co.* v. *United Drug Co.*, 38 F. (2d) 671 (Del., 1930); *Jones* v. *Consolidated Wagon & Machine Co.*, 31 F. (2d) 383 (S. D. Idaho, 1929), appeal dismissed 280 U. S. 519; *Hagstoz* v. *Mutual Life Ins. Co. of New York*, 179 Fed. 569 (E. D. Penn., 1910); *Platt* v. *Massachusetts Real-Estate Co.*, 103 Fed. 705 (Mass., 1900).

petition alleged that defendant was doing business in the Western District and that it had an agent there for that purpose. The defendant filed "an answer or demurrer" on the ground that from the petition it appeared that the court was without jurisdiction. This demurrer was overruled by the court below. In this Court, the plaintiff contended "that the plaintiff in error had consented to be sued in the Western District of Texas by doing business and appointing an agent there" under a Texas statute requiring a foreign corporation desiring to transact business in the state to file, among other papers, "a resolution of its board of directors or stockholders, * * * authorizing service of process to be made upon any of its officers or agents" in Texas engaged in transacting its business (146 U. S. at pp. 206-207).

In reversing the decision below, the Court made two *alternative* answers to that contention: (1) the Texas statute referred to was unconstitutional and void, so that no validity or effect could be given to any action of the corporation pursuant thereto; and (2) the designation of agents for the service of process, pursuant to the statute, did not affect the defendant's right to object to the venue of the action. These two alternative grounds of decision, both of which are applicable to our case, were stated as follows (146 U. S. at pp. 207-208):

> "But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to

its provisions. *Insurance Co.* v. *Morse*, 20 Wall. 445; *Barron* v. *Burnside*, 121 U. S. 186; *Texas Land Co.* v. *Worsham*, 76 Texas 556. Moreover, the supposed agreement of the corporation went no further than to stipulate that process might be served on any officer or agent engaged in its business within the State. It did not undertake to declare the corporation to be a citizen of the State, nor (except by the vain attempt to prevent removals into the national courts) to alter the jurisdiction of any court as defined by law. The agreement, if valid, might subject the corporation, after due service on its agent, to the jurisdiction of any appropriate court of the State. *Lafayette Ins. Co.* v. *French*, 18 How. 404. It might likewise have subjected the corporation to the jurisdiction of a Circuit Court of the United States held within the State—so long as the Judiciary Acts of the United States allowed it to be sued in the district in which it was found. *Ex parte Schollenberger*, 96 U. S. 369, *New England Ins. Co.* v. *Woodworth*, 111 U. S. 138; *In re Louisville Underwriters*, 134 U. S. 488. But such an agreement could not, since Congress (as held in *Shaw* v. *Quincy Mining Co.* above cited) has made citizenship of the State, with residence in the district, the sole test of jurisdiction in this class of cases, estop the corporation to set up non-compliance with that test, when sued in a Circuit Court of the United States."

Both grounds of decision are applicable to our case. The New York statute in our case would, like the Texas statute in the *Denton* case, be unconstitutional if construed as the petitioners wish it to be construed, that is to say, as requiring as a condition to entry of a foreign

corporation into the State of New York to do business, that the foreign corporation should file a designation which would have the effect of waiving the privilege of the foreign corporation to contest venue in a federal court action.

The petitioners in their argument here, and indeed the Court below itself in its opinion in our favor, overlooked the fact that the first ground of decision in the *Denton* case (invalidity of the State statute if construed as the petitioners would construe it) is applicable here. Assuming the contrary (as they do), the petitioners argue that this Court's discussion of the waiver question in the *Denton* case was only a dictum and not, as we may contend, *an alternative ground for decision.* The Court below answered that argument in the following language (R. 91):

> "The appellants attempt to distinguish this case on several grounds going to show that this statement was dictum only, unnecessary to the decision. It was, however, a direct statement on the point in question and has been accepted as authoritative. It is true that in the *Denton* case the Texas statute authorizing qualification of a foreign corporation to do business in the state was held unconstitutional, since it required as a condition of such qualification that the corporation relinquish its right of removal of cases to the federal courts. But the holding that there was no waiver was made an alternative ground of decision."[12]

[12]The opinion of the Court below goes on to discuss two contentions made by the petitioners in that Court, but which they have apparently now abandoned, *i.e.*, that the Texas statute had been repealed before the *Denton* suit was brought, and that correspondence between the petitioners' attorney and the present Secretary of State of the State of Texas indicated that no actual designation under the statute by the

The petitioners also profess to see "two principles fundamentally inconsistent with each other" lurking in the *Denton* decision, as well as in *Shaw* v. *Quincy Mining Company*, which has already been referred to in Point I, *supra*. If we understand them correctly, the petitioners' argument is that the principle that a corporation is a citizen and resident only of the state of its incorporation is inconsistent with the principle established by the *Denton* case that the designation of an agent for service of process is not an express waiver of future venue objections. We see no such inconsistency. The petitioners' argument assumes (Petitioners' brief, p. 28) that under the concept of corporate citizenship and residence, it would take something more than a mere consent to receive service of process in order to bring a corporation before a court outside the state of its incorporation. Of course, that is not true. It is too well settled to admit of argument that if a corporation in one state does business in other states it is subject to the jurisdiction of the courts in such other states, providing process can be served in a proper manner upon it. Given the doing of business within the state, the court's jurisdiction is complete upon either the service or acceptance of process, and no "consent to be sued" or "consent to appear" is necessary.

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defendant corporation in the *Denton* case could now be found in his files. The court below disposed of these contentions, as follows (R. 91):

> "It is also claimed that the act had already been repealed, and that the Texas records do not disclose any actual designation of the defendant corporation. But the facts stated by the court show that the repeal came after the action was brought, and the decision was rendered on the basis, admitted on the record, that the corporation had complied with the statute."

As a matter of historical interest, it may be pointed out that before the decision of this Court in the *Denton* case, there was some confusion in the decisions of the lower federal courts, and the petitioners have been able to find some earlier decisions,[13] and a dictum,[14] which support their argument.

There has also been a recent decision by the Tenth Circuit Court of Appeals in *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 100 F. (2d) 770 (1938), in which this Court has granted certiorari and which will be argued immediately before our case. The Tenth Circuit Court of Appeals was careful to state that its decision was being placed on a special ground, viz., its construction of certain Oklahoma statutes. However, with the exception of the *Oklahoma Packing* case, and one other District Court decision which was affirmed on a different

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[13] *Shainwald* v. *Davids*, 69 Fed. 704 (N. D. Cal., 1895); and *Consolidated Store Service Co.* v. *Lamson Consolidated Store-Service Co.*, 41 Fed. 833 (C. C. Mass., 1890) (Petitioners' brief, p. 30, footnote 35). In view of the fact that the same judge who decided the latter case later reversed himself in *Platt* v. *Massachusetts Real-Estate Co.*, 103 Fed. 705 (Mass., 1900), the citation of the decision in another case (*Haight & Freese* v. *Weiss*, 156 Fed. 328 (C. C. A. 1st, 1907)), which did not involve the question here under consideration, is of no significance. The *Shainwald* case was decided on the untenable ground (POINT I, *supra*) that the defendant, a New York corporation, became an "inhabitant" of California within the meaning of § 51 of the Judicial Code by reason of having appointed an agent in California for the service of process.

[14] *United States* v. *Sheridan*, 119 Fed. 236 (W. D. Ky., 1902, Petitioners' brief, p. 30, footnote 35). Since that case involved a special statutory provision relating to suits against sureties on bonds given to the United States, it had nothing to do with the question presented in the present case.

ground on appeal,[15] the lower federal courts have consistently applied the principle established in the *Denton* case.[16]

2. The petitioners' argument that the designation of an agent under the New York statute was an express "consent to be sued" or "consent to appear", so that such a designation waived all future venue objections which the respondent might have, is based entirely on (1) a misunderstanding of the legislative history of the New York statute under which respondent's agent was designated, (2) a tortured and incorrect interpretation of the decision of this Court in *Ex parte Schollenberger*, 96 U. S. 369, and (3) a complete disregard of the effect upon that decision of the 1887 revision of the venue statute by Congress.

The petitioners contend that the designation of an agent, pursuant to the New York statute, was an express waiver of the venue objection here asserted. They do not question the proposition that there would have been no waiver if respondent had been doing business in New York *without* qualifying as a foreign corporation, which proposition is supported by the cases cited in Point I, *supra*, as well as by the cases cited in this part of our brief.

In order to support such an express waiver, the petitioners are forced to look for something in the New York statutes *requiring* foreign corporations to make it. If

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[15] *Patten* v. *Dodge Mfg. Co.*, 23 F. (2d) 852 (Ind., 1928), which was affirmed by the Seventh Circuit Court of Appeals in *Dodge Mfg. Co.* v. *Patten*, 60 F. (2d) 676 (1932), upon the equally untenable ground that the corporation there involved had become a resident of a state other than that in which it was incorporated.

[16] In the cases cited at p. 22, footnote 11, *supra*.

there were such a statutory requirement, it would be unconstitutional under the principle of this Court's decision in the *Denton* case. However, we need not dwell on that question, because the petitioners can find nothing in the statutes constituting such a requirement, and nothing in the designation constituting such a waiver. The language of the designation is as follows (R. 59):

> "Said corporation, [respondent] hereby designates Thomas A. McDonald as the person upon whom a summons may be served within the State of New York, or any process or other paper whereby a special proceeding is commenced in a court or before an officer * * *."

The statute pursuant to which the designation was filed (quoted in Petitioners' brief, pp. 11-12) is equally silent on the subject of waiver, simply providing for the filing of a statement containing items concerning the nature of its business, its principal place of business within the state, and "designating, in the manner prescribed in the Code of Civil Procedure, a person upon whom process against the corporation may be served within the state."

(a) *The legislative history of the New York statute providing for designation by foreign corporations of agents for the service of process against them.*

Since the argument in the courts below, petitioners have evolved an elaborate argument that the New York Legislature intended to require foreign corporations to consent to be sued in New York, even though it was not expressly so provided in the statute. Apart from the objection that the argument would be subject to the constitutional objec-

tion already mentioned, it is based upon a misinterpretation of the legislative history of the provision in the New York statutes relating to designation.[17]

Stated briefly, we understand the petitioners' contention to be that provision was made in the New York statutes for "consents to be sued" by foreign corporations through the device of requiring them to designate agents for the service of process, because of a doubt, under the existing New York authorities, as to the power of the New York courts to obtain personal jurisdiction over foreign corporations, even though doing business in the state, without their consent (Petitioners' brief, pp. 19-20). The facts, as developed by petitioners, completely destroy any such inference. It is true, as petitioners indicate on p. 13 of their brief, that when the *first* statute requiring foreign corporations to designate agents for the service of process was passed,[18] there were decisions of the lower New York courts indicating that no foreign corporation could be sued in New York without its consent. There were also cases indicating the contrary (Petitioners' brief, p. 13, footnote 7). However, that first statute was repealed in 1877,[19] and from then until 1892 there was no statutory provision on the subject. During the fifteen intervening years, the courts of New York went to the opposite extreme with respect to foreign corporations, *i.e.*, it was held in at least one case

[17]Petitioners have substituted this argument for another which they unsuccessfully made in the Courts below based upon § 225 of the New York General Corporation Law. This contention was so completely demolished by the Court below (R. 94) that petitioners have apparently seen fit to abandon it.

[18]L. 1855, c. 279.

[19]L. 1877, c. 417, § 29.

(*Pope* v. *Terre Haute Car Mfg. Co.*, 87 N. Y. 137 (1881)) that jurisdiction could be obtained over foreign corporations by serving officers thereof temporarily within the state, even though the corporations did no business in New York.[20] Then, in 1892, the provision for designation of agents to receive process was reenacted.[21] Certainly in 1892 there could have been no doubt in the mind of any legislator as to the power of the New York courts to obtain personal jurisdiction over foreign corporations doing business within the state, whether or not the corporation consented to be sued. On the contrary, the purpose of the reenactment was simply to require foreign corporations engaged in business in New York to have someone in the state with authority equal to that of the officers of the corporation in respect of the service of process (see *Bagdon* v. *Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432, 438;[22] *Emmerich Co.* v. *Sloane*, 108 App. Div. 330, 334

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[20]In 1907 the New York Court of Appeals rather reluctantly withdrew from the extreme position taken in the *Pope* case (*Grant* v. *Cananea Copper Co.*, 189 N. Y. 241), and applied the rule established by this Court in *Goldey* v. *Morning News*, 156 U. S. 518.

[21]L. 1892, c. 687, § 16.

[22]In discussing the distinction between the "implied" consent to be sued and the "express" consent to be sued which the petitioners claim there is in the present case, petitioners refer to the *Bagdon* case (Petitioners' brief, p. 20) and to *Penn. Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93 (Petitioners' brief, pp. 28, 29). The court below completely disposed of a similar point, based upon the *Bagdon* case and a similar decision in *Smolick* v. *Philadelphia & Reading Coal & Iron Co.*, 222 Fed. 148 (S. D. N. Y. 1915), as follows (R. 94):

> "These cases are relied on as showing the corporation's consent, by its designation of an agent to accept proc-

(1st Dept., 1905); and *System Co.* v. *Advertisers Cyclopedia Co.*, 121 N. Y. Supp. 611, 612 (App. Term, 1910, not officially reported).

(b) *Petitioners' interpretation of Ex parte Schollenberger*, 96 U. S. 369.

In the *Schollenberger* case a Pennsylvania citizen brought suit in the Eastern District of Pennsylvania against four insurance companies which had designated an agent for the service of process pursuant to Pennsylvania law. At that time, the old venue statute was in force, permitting suits against persons in the district of their residence or in the district in which they might be "found". This Court held that the suit could be maintained, upon the ground that the defendants "were actually found" in the district. The petitioners place a much broader interpretation upon that decision. They construe it as a holding that, by the designation of an agent, the defendant corporations waived their venue objections under both parts of

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ess, to being sued on all transitory actions, whereas without such designation, suit would lie only in the jurisdiction where it had done the business out of which the cause of action arose. But this concerns the jurisdiction of the court over the case, not the personal privilege as to the place of the suit accorded the defendant by Jud. Code, §51. Jurisdiction over the causes was obtained, since personal service could be had on the defendants through their agents designated to accept process. * * * So here, had plaintiffs been residents of the Southern District of New York, so that the venue was properly laid, service of process upon the defendant would have been had by service upon its agent. The cases do not go beyond this or affect the requirement of venue."

the then existing venue statute, that is, under the "finding" provision and the "residence" provision. Our interpretation of the *Schollenberger* decision is that it was based entirely upon the proposition that the defendants were "actually found" in the district, and that the Court did not mean to decide anything with respect to the "residence" objection. Such interpretation is based upon what Chief Justice Waite said at p. 377 of the opinion:

> "So, as in this case, if the legislature of a State requires a foreign corporation to consent to be 'found' within its territory, for the purpose of the service of process in a suit, as a condition to doing business in the State, and the corporation does so consent, *the fact that it is found gives the jurisdiction*, notwithstanding the finding was procured by consent. *The essential fact is the finding*, beyond which the court will not ordinarily look." (Italics added.)

and at page 378:

> "Here, the defendant companies have provided that they can be found in a district other than that in which they reside, if a particular mode of proceeding is adopted, *and they have been so found.* In our opinion, therefore, the Circuit Court has jurisdiction of the causes, and should proceed to hear and decide them." (Italics added.)

In view of this language, we submit that there can be no doubt as to the correctness of our interpretation of the *Schollenberger* decision, which is also the interpretation placed upon it by this Court in the *Denton* case in the portion of the opinion quoted at page 24, *supra.*

(c) *The effect upon the Schollenberger decision of the 1887 change in the venue statute.*

Since the provision of the venue statute relating to the "finding" of defendants was eliminated by Congress in 1887, the *Schollenberger* decision, as interpreted in the *Denton* case, is now without any bearing on problems under Judicial Code § 51 in its present form. Since petitioners misconstrue the *Schollenberger* decision in a manner not justified by the holding of the case or the language of the opinion, they likewise disregard the effect of the change in the venue statute. The net result of their argument is, therefore, that corporations can now be sued wherever they can be legally "found", *i.e.*, in any state where they comply with the statutes applicable to foreign corporations. Thus, they contend for virtual reenactment of the old venue statute repealed by Congress in 1887, in so far as corporations are concerned. We submit that such an appeal must be made to the legislative and not to the judicial branch of the Government.

CONCLUSION

The order, judgment and decree of the Circuit Court of Appeals for the Second Circuit should be affirmed. The suit does not satisfy the venue requirements of § 51 of the Judicial Code, because neither any of the petitioners nor respondent is a resident of the Southern District of New York. The respondent did not waive its right to object to the venue of the suit by qualifying to do business in

New York as a foreign corporation and designating an agent to receive service of process against it.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 38.—October Term, 1939.

Neirbo Company, The A. P. Smith Manufacturing Company, *et al.*, Petitioners, *vs.* Bethlehem Shipbuilding Corporation, Ltd.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 22, 1939.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The case is here to review the affirmance by the Circuit Court of Appeals for the Second Circuit of an order of the District Court for the Southern District of New York setting aside service of process upon Bethlehem Shipbuilding Corporation, Ltd. (hereafter called Bethlehem) and dismissing as to it petitioners' bill, 103 F. (2d) 765. The suit was based on diversity of citizenship and was not brought "in the district of the residence of either the plaintiff or the defendant." (§ 51 of the Judicial Code, Act of March 3, 1887, 24 Stat. 552, as corrected by Act of August 13, 1888, 25 Stat. 433, 28 U. S. C. § 112.[1]). We took the case, 307 U. S. —, because of the uncertainties in application of § 51, emphasized by conflict between the views below and those of the Circuit Court of Appeals for the Tenth Circuit. *Oklahoma Packing Co.* v. *Oklahoma Gas and Elec. Co.*, 100 F. (2d) 770. The sole question in the case is whether § 51 is satisfied by the designation by a foreign corporation of an agent for service of process, in conformity with the law of a state in which suit is brought against it in one of the federal courts for that state.

[1] Section 112(a) reads as follows: "Except as provided in sections 113 to 117 of this title, no person shall be arrested in one district for trial in another in any civil action before a district court; and, except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a law suit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. This basic difference between the court's power and the litigant's convenience is historic in the federal courts. After a period of confusing deviation it was firmly reestablished in *General Inv. Co.* v. *Lake Shore Ry.*, 260 U. S. 261, and *Lee* v. *Chesapeake and Ohio Ry. Ibid* 653, over-ruling *Ex parte Wisner*, 203 U. S. 449, and qualifying *In re Moore*, 209 U. S. 490. All the parties may be non-residents of the district where suit is brought. *Lee* v. *Chesapeake and Ohio Ry., supra.* Section 51 "merely accords to the defendant a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election." *Commercial Ins. Co.* v. *Stone Co.*, 278 U. S. 177, 179.

Being a privilege, it may be lost. It may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct. *Commercial Ins. Co.* v. *Stone Co., supra.* Whether such surrender of a personal immunity be conceived negatively as a waiver or positively as a consent to be sued, is merely an expression of literary preference. The essence of the matter is that courts affix to conduct consequences as to place of suit consistent with the policy behind § 51, which is "to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district, or wherever found." *General Inv. Co.* v. *Lake Shore Ry., supra* at 275.

When the litigants are natural persons the conceptions underlying venue present relatively few problems in application. But in the case of corporate litigants these procedural problems are enmeshed in the wider intricacies touching the status of a corporation in our law. The corporate device is one form of associated enterprise, and what the law in effect has done is to enforce rights and duties appropriate for collective activity. *Cf. United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344; *Puerto Rico* v. *Russell*, 288 U. S. 476. It has done so largely by assimilating corporations to natural persons. The long, tortuous evolution of the methods whereby foreign corporations gained access to courts or could be brought there, is the history of judicial groping for a

reconciliation between the practical position achieved by the corporation in society and a natural desire to confine the powers of these artificial creations.[2]

It took half a century of litigation in this Court finally to confer on a corporation, through the use of a fiction,[3] citizenship in the chartering state for jurisdictional purposes. Compare *Lafayette Ins. Co.* v. *French*, 18 How. 404 with *Hope Ins. Co.* v. *Boardman*, 5 Cranch 57. Throughout, the mode of thought was metaphorical. The classic doctrine was that a corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty." *Bank of Augusta* v. *Earle*, 13 Pet. 519, 588. Logically applied, this theory of non-migration prevented suit in a non-chartering state, for the corporation could not be there.[4] And such was the practice of the circuit courts[5] until the opinion of Chief Justice Waite in *Ex parte Schollenberger*, 96 U. S. 369, displaced metaphor with common sense. The essential difference between the practice which Mr. Justice Nelson[6] initiated at circuit and the decision in *Schollenberger's* case was not a matter of technical legal construction, but a way of looking at corporations. Men's minds had become habituated to corporate activities which crossed state lines. The fact that corporations did do business outside their originating bounds made intolerable their immunity from suit in the states of their activities. And so they were required by legislatures to designate agents for service of process in return for the privilege of doing local business. That service upon such an agent, in conformity with a valid state statute, constituted consent to be sued in the federal court and thereby supplanted the immunity as to venue, was the rationale of *Schollenberger's* case.

To be sure, that case arose under the Judiciary Act of 1875, 18 Stat. 470, the language of which differed from the Act of 1887, now § 51 of the Judicial Code. The earlier provision was

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[2] See Henderson, "The Position of Foreign Corporations in American Constitutional Law"; *passim*, and especially the illuminating analysis pp. 163-194.

[3] See Gray, "The Nature and Sources of the Law", 184, and Henderson, *op. cit. supra*, note 2, pp. 50-76.

[4] See *St. Clair* v. *Cox*, 106 U. S. 350, 355.

[5] "We are aware that the practice in the circuit courts generally has been to decline jurisdiction in this class of suits." 96 U. S. 369, 378.

[6] *Day* v. *Newark India Rubber Mfg. Co.*, 1 Blatch. 628; *Pomeroy* v. *New York, N. H. & H. R. R. Co.*, 4 Blatch. 120. Both these cases were decided by Mr. Justice Nelson, on circuit.

as follows: "And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found . . ." The Act of 1887 omitted the words "in which he shall be found." But, of course, the Phoenix and the Clinton Insurance Company in *Ex parte Schollenberger, supra,* were not geographically "found" in Pennsylvania, and Chief Justice Waite so recognized. They were "found" in the Eastern District of Pennsylvania only in a metaphorical sense, because they had consented to be sued there by complying with the Pennsylvania law for designating an agent to accept service. Not less than three times does the opinion point out that the corporation gave "consent" to be sued; and because of this consent the Chief Justice added that the corporation was "found" there. But the crux of the decision is its reliance upon two earlier cases, *Railroad Company* v. *Harris,* 12 Wall. 65 and *Lafayette Ins. Co.* v. *French,* 18 How. 404, recognizing that "consent" may give "venue". The Phoenix and the Clinton Insurance Company consented not to be "found" but to be sued. Since the corporation had consented to be sued in the courts of the state, this Court held that the consent extended to the federal courts sitting in that state. As to diversity cases, Congress has given the federal courts "cognizance, concurrent with the courts of the several States". The consent, therefore, extends to any court sitting in the state which applies the laws of the state.[7]

The notion that the 1887 amendment, by eliminating the right to sue a defendant in the district "in which he shall be found", was meant to affect the implications of a consent to be sued—implications which were the basis of the *Schollenberger* decision—derives from a misapplication of the purpose of Congress to contract diversity jurisdiction, based upon a misunderstanding of the legislative history of the 1887 amendment.[8] The deletion of "in which he shall be found" was not directed toward any change in the status of a corporate litigant. The restriction was designed to shut the door

[7] "While the Circuit Court may not be technically a court of the Commonwealth, it is a court within it; and that, as we think, is all the legislature intended to provide for." 96 U. S. 369, 377. See *Traction Company* v. *Mining Company,* 196 U. S. 239, 255-56; *Cf. Louisville and N. R. Co.* v. *Chatters,* 279 U. S. 320, 329.

[8] A cognate misconception as to the purpose of the Act of 1887-88 in contracting the jurisdiction of the circuit courts underlay the decision in *Ex parte Wisner,* 203 U. S. 449, overruled in *Lee* v. *Chesapeake & Ohio Ry.,* 260 U. S. 653, 659.

against service of process upon a natural person in any place where he might be caught. It confined suability, except with the defendant's consent, to the district of his physical habitation. Insofar as the 1887 legislation sheds any light upon the status of a corporate litigant in diversity suits, its significance lies outside the omission of the "he shall be found" clause. The form in which that Act passed the House of Representatives contained a provision, wholly distinct from the general venue section, restricting the growing volume of litigation drawn to the federal courts by the fiction of corporate citizenship.[9] It prohibited resort to the federal courts by foreign corporations authorized to do a local business. The Senate rejected, as it had done upon three previous occasions, this House proposal.[10] But the bill, as it left the House, also contained the venue provision, with its omission of the "found" clause. It would be strange indeed if the House in § 1 had dealt with the "venue" of suits against corporate litigants who, like those involved in the *Schollenberger* case, by § 3 of the same bill were completely barred from the federal courts. It would be stranger still if, after passing a drastic measure curtailing resort by foreign corporations to the federal courts, the House had only succeeded in giving discriminatory freedom to foreign corporations—discriminatory in that, by nullifying the significance of consent through obedience to state law to be sued in the federal courts, it would allow a foreign corporate defendant freedom either to remain in the state courts or to remove to a federal court.

And so, after the Act of 1887 and despite its elimination of "in which he shall be found" from the Act of 1875, lower federal courts continued to apply the doctrine of *Schollenberger's* case by considering the designation of an agent for service of process an effective consent to be sued in the federal courts.[11] This practice in

[9] The Culberson Bill, which passed the House in 1887, was H. R. 2441, 49th Cong., 1st Sess. It provided in its original form that the lower federal courts should not take "cognizance of any suit" between "a corporation created or organized by or under the laws of any State and a citizen of any State in which such corporation at the time the cause of action accrued may have been carrying on any business authorized by the law creating it. . . ." There were likewise provisions forbidding removal of such suits to the lower Federal courts. See 17 Cong. Rec. 614; H. Rep. No. 1078, 49th Cong., 1st Sess.

[10] 10 Cong. Rec. 1304-1305; 14 Cong. Rec. 1270; 15 Cong. Rec. 4909.

[11] *Riddle* v. *New York R. Co.*, 39 Fed. 290 (C. C., W. D. Pa., 1889); *Consol. Store-Service Co.* v. *Lamson Consol. Store-Service Co.*, 41 Fed. 833 (C. C. Mass., 1890) approvingly cited in *Haight & Freese Co.* v. *Weiss*, 156 Fed. 328 (C. C. A. 1st, 1907).

the lower federal courts continued until 1892, when *Southern Pacific Co.* v. *Denton*, 146 U. S. 202 was decided. But that case involved an entirely different situation. The Court was there concerned with a Texas statute which not merely regulated procedure for suit but sought to deny foreign corporations access to the federal courts. This Court held the act unconstitutional, as the Texas court had in fact already done.[12] Inasmuch as the Texas act was found to be void, it "could give no validity or effect to any agreement or action of the corporation in obedience to its provisions."[13] To be sure, the Court went on to interpret the agreement "if valid"[14] and to suggest that had it been valid the agreement might have subjected the corporation to jurisdiction "so long as the Judiciary Acts of the United States allowed it to be sued in the district in which it was 'found'."[15] Such, as we have seen, was not the true basis of the decision in *Schollenberger's* case. As decisions, the two cases are wholly consistent. But, disregarding the situation before the Court in the *Denton* case—the absence of any valid consent to be sued because of the invalidity of the statute by which the alleged "consent" was obtained—several of the lower courts have taken language from the *Denton* opinion and have made it govern situations where valid consent did exist because given in conformity with the provisions of a valid statute.[16] Other courts have adhered to the

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12 *Texas Land & Mortgage Co.* v. *Worsham*, 76 Tex. 556.

13 146 U. S. at 207.

14 146 U. S. at 207.

15 146 U. S. at 207. The Denton case was based on *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, in which there was no consent derivable from the designation of an agent for service. Both opinions were written by Mr. Justice Gray, who later accurately delimited the scope of the holdings in both the *Shaw* and the *Denton* cases. *In re Keasbey & Mattison Co.*, 160 U. S. 221, 229. The decisive difference between the present case and *In re Keasbey & Mattison Co.*, is that in the latter case the designation under state law which is the basis of consent had in fact not been made. But the requirement of "residence" in the Act of 1887 is as much satisfied by a consent to be sued as was the requirement "to be found" in the 1875 Act satisfied by such a consent.

16 *Platt* v. *Mass. B. E. Co.*, 103 Fed. 705 (C. C. Mass., 1900); *Hagstoz* v. *Mutual Life Ins. Co.*, 179 Fed. 569 (C. C. E. D. Pa., 1900); *Beech-Nut Packing Co.* v. *P. Lorillard Co.*, 287 Fed. 271 (S. D. N. Y., 1921); *Jones* v. *Consol. Wagon Co.*, 31 F. (2d) 384 (D. Mass., 1928); *Kerfoot* v. *United Dairy Co.*, 38 F. (2d) 691 (D. Del., 1930); *Standard Stoker Co.* v. *Lower*, 46 F. (2d) 678 (D. Md., 1931); *McLean* v. *Mississippi*, 96 F. (2d) 741 (C. C. A. 5th, 1938); *Gray* v. *Reliance Ins. Co.*, 24 F. Supp. 144 (W. D. La., 1938); *Hamilton Watch Co.* v. *George W. Borg Co.*, 27 F. Supp. 215 (N. D. Ill., 1939); *Toulmin* v. *James Mfg. Co.*, 27 F. Supp. 512 (W. D. N. Y., 1939). *Cf. Heine Chimney Co.* v. *Rust Engineering Co.*, 12 F. (2d) 596 (C. C. A. 2nd, 1926).

practice established by *Schollenberger's* case.[17] We deem this practice sound, and it controls the present case.

In conformity with what is now § 210 of the General Corporation Law of New York,[18] Bethlehem designated "William J. Brown as the person upon whom a summons may be served within the State of New York." The scope and meaning of such a designation as part of the bargain by which Bethlehem enjoys the business freedom of the State of New York, have been authoritatively determined by the Court of Appeals, speaking through Judge Cardozo: "The stipulation is, therefore, a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent. He is made the person 'upon whom process against the corporation may be served'. . . . The contract deals with jurisdiction of the person. It does not enlarge or diminish jurisdiction of the subject-matter. It means that whenever jurisdiction of the subject-matter is present, service on the agent shall give jurisdiction of the person." *Bagdon* v. *Phil. and Reading C. & I. Co.*, 217 N. Y. 432, 436-7. A statute calling for such a designation is constitutional, and the designation of the agent "a voluntary act." *Penna. Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U. S. 93.

In finding an actual consent by Bethlehem to be sued in the courts of New York, federal as well as state, we are not subjecting federal procedure to the requirements of New York law. We are recognizing that "state legislation and consent of parties may bring about a state of facts which will authorize the courts of the United States to take cognizance of a case." *Ex parte Schollenberger, supra* at 377. The judgment below is

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[17] *Shainwald* v. *Davids*, 69 Fed. 704 (N. D. Cal., 1895); *Dodge Mfg. Co.* v. *Patten*, 23 F. (2d) 852 (D. Ind., 1928), aff'd 60 F. (2d) 676 (C. C. A. 7th, 1932); *Oklahoma Packing Co.* v. *Oklahoma Gas & Elec. Co.*, 100 F. (2d) 770 (C. C. A. 10th, 1938).

[18] Originally enacted as c. 687, Laws of 1892, pp. 1805-1806.

SUPREME COURT OF THE UNITED STATES.

No. 38.—October Term, 1939.

Neirbo Company, The A. P. Smith Manufacturing Company, et al., Petitioners, *vs.* Bethlehem Shipbuilding Corporation, Ltd.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 22, 1939.]

Mr. Justice Roberts.

The Circuit Court of Appeals, in a careful and discriminating opinion,[1] has held that to deny the respondent's motion to dismiss it from the suit would be to disregard the long settled construction of Sec. 51 of the Judicial Code and the equally well settled application of that section. I think its judgment should be affirmed.

Whatever may be said in support of the original adoption of a different rule, it has been the law for a century that, as respects the jurisdiction of the federal courts over a corporation in diversity of citizenship cases, the corporation is a citizen and resident of the state of incorporation and of no other state. I do not understand the court's opinion to repudiate the rule.

The statute which is now § 51 of the Judicial Code took its present form in 1888. In 1892 the court held, in *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 453, that, under the statute, "a corporation, incorporated in one State only, cannot be compelled to answer, in a Circuit Court of the United States held in another State in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different State." This construction has been followed in this court without deviation and with practical unanimity by the lower federal courts.[2]

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[1] 103 F. (2d) 765.

[2] In re Keasbey and Mattison Co., 160 U. S. 221; Macon Grocery Co. v. Atlantic Coast Line R. R. Co., 215 U. S. 501; Ladew v. Tennessee Copper Co., 218 U. S. 357; Male v. Atchison &c. Ry., 240 U. S. 97; General Inv. Co. v. Lake Shore Ry., 260 U. S. 261, 271; Seaboard Rice Milling Co. v. Chicago,

At the next term, in *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 205, 207, the ruling was reaffirmed in a case where the defendant had registered as a foreign corporation under a state law and, as a condition of registration, had agreed that service of process might be made upon a designated agent.

The earlier Act of 1875 provided that no civil suit could be brought against a defendant in a United States court "in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process" . . . .

Ex parte Schollenberger, 96 U. S. 369, applied that earlier statute. The court held that a foreign corporation which had registered and consented to the service of process upon a designated agent had thereby agreed "to be found" within the state and might therefore be impleaded in a federal court sitting in the state although it was not a citizen or a resident of the state. The case was cited in the opinions in both the *Shaw* and the *Southern Pacific* cases. In the latter the court said, referring to the foreign corporation's agreement as to service: (pp. 207-8) "It might likewise have subjected the corporation to the jurisdiction of a Circuit Court of the United States held within the State—so long as the Judiciary Acts of the United States allowed it to be sued in the district in which it was found. . . . But such an agreement could not, since Congress (as held in *Shaw* v. *Quincy Mining Co.* above cited) has made citizenship of the State, with residence in the district, the sole test of jurisdiction in this class of cases, estop the corporation to set up non-compliance with that test, when sued in a Circuit Court of the United States."

In re Keasbey and Mattison Co., 160 U. S. 221, the court held (p. 228): "Under the provision of that act [the earlier act of 1875], which allowed a defendant to be sued in the district of which he was an inhabitant, or in that in which he was found, a corporation could doubtless have been sued either in the district in which it was incorporated, or in any district in which it carried on business and had a general agent." For this statement the court cited *Ex parte Schollenberger*, *Shaw* v. *Quincy Mining Company*, and *Southern Pacific Company* v. *Denton*. The opinions in the last two, and that

R. I. & P. Ry. Co., 270 U. S. 363; Luckett v. Delpark, Inc., 270 U. S. 496; Burnrite Coal Co. v. Riggs, 274 U. S. 208, 211. The decisions in the federal courts are cited and discussed by the Circuit Court of Appeals, 103 F. (2d) 767.

in the *Keasbey* case, were written for the court by Mr. Justice Gray, who summed up their effect by saying: "And it is established by the decisions of this court that, within the meaning of this act, a corporation cannot be considered a citizen, an inhabitant or a resident of a State in which it has not been incorporated; and, consequently, that a corporation incorporated in a State of the Union cannot be compelled to answer to a civil suit, at law or in equity, in a Circuit Court of the United States held in another State, even if the corporation has a usual place of business in that State."

This interpretation of Sec. 51 has since remained unchanged. Congress must have known of and acquiesced in the courts' construction of the section, particularly as there have been efforts to amend it, and no alteration has been adopted.

Upon principle, and under the authorities, the mere fact that service of process valid under state law can be had on an officer or agent of a foreign corporation doing business within the state is irrelevant; for although the corporation may be served in conformity to local law, it cannot be compelled to try its case in a federal court sitting in the state. I do not understand the opinion of the court to hold to the contrary.

But it is said that registration and designation of an agent upon whom service may be made under compulsion of state law amounts to a waiver of the requirements of Sec. 51 as to venue, or to a consent to be sued in a federal court sitting within the state.

As has been shown by quotation from the opinion, this contention was made in *Southern Pacific Co.* v. *Denton, supra,* and was overruled. The holding was one of the alternative grounds of decision. The *Southern Pacific* case settled the application of Sec. 51, in the circumstances here disclosed, and the decision has never been qualified or overruled. The lower federal courts have understood and applied that decision with practical uniformity to enable the foreign corporation to contest the venue of suits against it.[3]

I see no reason at this late day to attribute a new effect to the statute when Congress has not seen fit to express a view contrary to that embodied in this court's construction of the law; though this might at any time be done. The principle of *stare decisis* seems to me to make against such a change.

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[3] Some of the cases are cited by the Circuit Court of Appeals in its opinion. 103 F. (2d) 769.

The court below has analyzed the applicable New York statute and has satisfactorily demonstrated that it deals with service of process on foreign corporations in the courts of New York. The state could not, by its laws, affect the jurisdiction of federal courts or the venue of suits therein,—a matter solely within the control of Congress.

The CHIEF Justice and Mr. Justice MCREYNOLDS join in this opinion.